STIC Search Report

EIC 3600

Scientific & Technical Information Center
S T I C
USPTO

STIC Database Tracking Number: 10549[illegible]

TO: Jennifer Harle
Location:PK5-7B11
Art Unit: 3627
Wednesday, October 08, 2003

Case Serial Number: 09/426410

From: Elizabeth Deal ED
Location: EIC 3600
PK5-Suite 804
Phone: 305-5783

elizabeth.deal@uspto.gov

Search Notes

Dear Jennifer,

Attached are the results of the above-referenced search. If you have any questions or comments, please feel free to contact me.

Libby

BEST AVAILABLE COPY

Access DB# 104130

SEARCH REQUEST FORM

705/37

Scientific and Technical Information Center

Requester's Full Name: J. Harle Examiner #: 71066 Date: 10/1/03

Art Unit: 3627 Phone Number 30 6-8906 Serial Number: 09/420410

Mail Box and Bldg/Room Location: 7D11 Results Format Preferred (circle): PAPER DISK E-MAIL

If more than one search is submitted, please prioritize searches in order of need.

****

Please provide a detailed statement of the search topic, and describe as specifically as possible the subject matter to be searched. Include the elected species or structures, keywords, synonyms, acronyms, and registry numbers, and combine with the concept or utility of the invention. Define any terms that may have a special meaning. Give examples or relevant citations, authors, etc, if known. Please attach a copy of the cover sheet, pertinent claims, and abstract.

Title of Invention: Electronic Multilateral Negotiation System

Inventors (please provide full names): Efraim Y. Ephrati, Yoav Shoham, Michael P. Wellman

Earliest Priority Filing Date: 7/12/99

***For Sequence Searches Only* Please include all pertinent information (parent, child, divisional, or issued patent numbers) along with the appropriate serial number.**

32-38

Please search for a switchable bilateral negotiation w/multiple attributes.

It is a one-to-many negotiation system where one-to-one negotiation is going on but bids are coming in and the current negotiation can be replaced

multiple attributes are things like: price, quantity, purity, quality, location, delivery time, warranty types, i.e. a plurality of the attributes of the goods/services being negotiated.

other search terms: auction, Decision Support System, Negotiation Support System

Please feel free to call & talk. I know I've had trouble finding this concept.

****

STAFF USE ONLY		Type of Search		Vendors and cost where applicable	
Searcher:	Bode Akintola	NA Sequence (#)		STN	1122
Searcher Phone #:	308 6130	AA Sequence (#)		Dialog	$1,363.12
Searcher Location:	EIC 3600	Structure (#)		Questel/Orbit	
Date Searcher Picked Up:	10-01-03	Bibliographic		Dr.Link	
Date Completed:	10-02-03	Litigation		Lexis/Nexis	
Searcher Prep & Review Time:	120m	Fulltext		Sequence Systems	
Clerical Prep Time:		Patent Family		WWW/Internet	✓
Online Time:	130m	Other		Other (specify)	

PTO-1590 (1-2000)

REFOCUS

Access DB# 105496

SEARCH REQUEST FORM

705/37

Scientific and Technical Information Center

Requester's Full Name: T. Hale Examiner #: 71006 Date: 10/1/03

Art Unit: 3627 Phone Number 306-2906 Serial Number: 09/426440

Mail Box and Bldg/Room Location: 7C11 Results Format Preferred (circle): PAPER DISK E-MAIL

If more than one search is submitted, please prioritize searches in order of need.

****

Please provide a detailed statement of the search topic, and describe as specifically as possible the subject matter to be searched. Include the elected species or structures, keywords, synonyms, acronyms, and registry numbers, and combine with the concept or utility of the invention. Define any terms that may have a special meaning. Give examples or relevant citations, authors, etc, if known. Please attach a copy of the cover sheet, pertinent claims, and abstract.

Title of Invention: Electronic Multilateral Negotiation System

Inventors (please provide full names): ______

Earliest Priority Filing Date: 7/12/99

For Sequence Searches Only *Please include all pertinent information (parent, child, divisional, or issued patent numbers) along with the appropriate serial number.*

May have to search law reviews...

Try

mergers & acquisitions / take over law

- shopping the offer
- competitive leverage
- maximize price

Strategy of threat points in game theory

real estate

contingency contracts

sequential bargaining.

Authors...

Schelling, Nalbuff

Roth (Carnegie Mellon)

****

STAFF USE ONLY	Type of Search		Vendors and cost where applicable	
Searcher:	NA Sequence (#)		STN	
Searcher Phone #:	AA Sequence (#)		Dialog	
Searcher Location:	Structure (#)		Questel/Orbit	
Date Searcher Picked Up:	Bibliographic		Dr.Link	
Date Completed:	Litigation		Lexis/Nexis	
Searcher Prep & Review Time:	Fulltext		Sequence Systems	
Clerical Prep Time:	Patent Family		WWW/Internet	
Online Time:	Other		Other (specify)	

PTO-1590 (1-2000)

IN THE CLAIMS

Please amend the claims as follows.

Please cancel claims 1-31.

Please add the following claims.

1-31 (Cancelled)

B1

32. (New) A machine-readable medium having instructions to cause a machine to perform a method of managing a switchable bilateral electronic negotiation, the method comprising:

facilitating a first active negotiation between a first party and a second party, wherein the facilitating the first active negotiation includes exchanging multi-attribute offers between the first party and the second party;

facilitating a first inactive negotiation between the first party and a third party, wherein facilitating the first inactive negotiation includes receiving a submitted multi-attribute offer from the third party;

automatically dropping the first active negotiation between the first party and the second party;

facilitating a second active negotiation between the first party and the third party; and

facilitating a second inactive negotiation between the first party and the second party.

33. (New) The machine-readable medium of claim 32, wherein facilitating the first active negotiation includes updating a first negotiation object.

34. (New) The machine-readable medium of claim 32, wherein facilitating the first inactive negotiation includes updating a second negotiation object.

35. (New) The machine-readable medium of claim 32, wherein facilitating the first inactive negotiation includes receiving a submitted multi-attribute offer from the third party.

already claimed in 1

36. (New) The machine-readable medium of claim 35, wherein the submitted multi-attribute offer is greater than a most recent submitted multi-attribute offer from the second party associated with the first active negotiation.

37. (New) The machine-readable medium of claim 32, further comprising automatically querying the first party whether to drop the first active negotiation.

conflicts w/ claim 1 (auto drop

38. (New) The machine-readable medium of claim 32, wherein facilitating the first active negotiation includes receiving a retraction of an offer associated with the first active negotiation and retracting the offer associated with the first active negotiation.

39. (New) A machine-readable medium having instructions to cause a machine to perform a method of managing a concurrent bilateral negotiation, the method comprising:

facilitating a first active negotiation between a first party and a second party, wherein facilitating the first active negotiation includes exchanging multi-attribute offers between the first party and the second party;

```
Set      Items   Description
S1           0   AU=(WELLAN M? OR WELLAN, M?)
S2        4883   NEGOTIAT? OR BARGAIN?
S3       12344   AUCTION? OR TRADING OR TRADE? ?
S4     2122229   CONSUMER? OR USER? OR BUYER? OR PARTICIPANT? OR CUSTOMER? -
             OR CLIENT? OR SUBSCRIBER? OR MEMBER? ? OR INDIVIDUAL? OR PERS-
             ON? ?
S5       61468   MERCHANT? OR RETAILER? OR VENDOR? ? OR MANUFACTURER? OR SE-
             LLER? OR PARTY OR WHOLESALER? OR SUPPLIER?
S6     6092561   PLURAL? OR SEVERAL OR VARIOUS OR MANY OR MULTIPL? OR NUMER-
             OUS OR DIFFERENT? OR FIRST OR SECOND OR 1ST OR  2ND OR ANOTHER
              OR SEPARATE? OR ALTERNAT?
S7        5560   BILATERAL? OR MULTILATERAL OR (BI OR MULTI)()LATERAL?
S8     2294302   ATTRIBUTE? OR QUANTITY OR PRICE? OR FEATURE? OR TYPE?
S9      131550   OFFER? OR COUNTEROFFER?
S10    2027355   PRODUCT? ? OR GOOD? ? OR ITEM? ? OR WARE? OR MERCHANDI?
S11     173398   S6(2N)(S4 OR S5)
S12         81   S11(25N)S2
S13         52   S11 AND S2 AND S8
S14          6   S7 AND S2
S15         28   (S12 OR S13)(20N)S10
S16         34   S14 OR S15
? show file
File 344:Chinese Patents Abs Aug 1985-2003/Apr
         (c) 2003 European Patent Office
File 347:JAPIO Oct 1976-2003/May(Updated 030902)
         (c) 2003 JPO & JAPIO
File 350:Derwent WPIX 1963-2003/UD,UM &UP=200361
         (c) 2003  Thomson Derwent
File 371:French Patents 1961-2002/BOPI 200209
         (c) 2002 INPI.  All rts. reserv.
```

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Set      Items   Description
S1           0   AU=(WELLAN M? OR WELLAN, M?)
S2       10627   NEGOTIAT? OR BARGAIN?
S3       86646   AUCTION? OR TRADING OR TRADE? ?
S4      904052   CONSUMER? OR USER? OR BUYER? OR PARTICIPANT? OR CUSTOMER? -
            OR CLIENT? OR SUBSCRIBER? OR MEMBER? ? OR INDIVIDUAL? OR PERS-
            ON? ? OR BIDDER?
S5      148232   MERCHANT? OR RETAILER? OR VENDOR? ? OR MANUFACTURER? OR SE-
            LLER? OR PARTY OR WHOLESALER? OR SUPPLIER?
S6        7978   BILATERAL? OR MULTILATERAL OR (BI OR MULTI)()LATERAL?
S7     1151458   ATTRIBUTE? OR QUANTITY OR PRICE? OR FEATURE? OR TYPE?
S8      163934   OFFER? OR COUNTEROFFER? OR BID OR BIDDING OR BIDS
S9      810056   PRODUCT? ? OR GOOD? ? OR ITEM? ? OR WARE? OR MERCHANDI?
S10     257334   (S4 OR S5)(2N)(PLURAL? OR SEVERAL OR VARIOUS OR MANY OR MU-
            LTIPL? OR NUMEROUS OR DIFFERENT? OR FIRST OR SECOND OR 1ST OR
             2ND OR ANOTHER OR SEPARATE? OR ALTERNAT?)
S11        670   S10(20N)S2
S12        332   S11(S)(S7 OR S8)
S13         98   S12(10N)S9
S14         74   S13 AND IC=G06F-017/60
? show file
File 348:EUROPEAN PATENTS 1978-2003/Sep W03
         (c) 2003 European Patent Office
File 349:PCT FULLTEXT 1979-2002/UB=20030925,UT=20030918
         (c) 2003 WIPO/Univentio
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Set      Items   Description
S1           0   AU=(WELLAN M? OR WELLAN, M?)
S2     1518868   NEGOTIAT? OR BARGAIN?
S3     4925193   AUCTION? OR TRADING OR TRADE? ?
S4    11756755   CONSUMER? OR USER? OR BUYER? OR PARTICIPANT? OR CUSTOMER? -
              OR CLIENT? OR SUBSCRIBER? OR MEMBER? ? OR INDIVIDUAL? OR PERS-
              ON? ? OR BIDDER?
S5     5650361   MERCHANT? OR RETAILER? OR VENDOR? ? OR MANUFACTURER? OR SE-
              LLER? OR PARTY OR WHOLESALER? OR SUPPLIER?
S6      322118   BILATERAL? OR MULTILATERAL OR (BI OR MULTI)()LATERAL?
S7     7315067   ATTRIBUTE? OR QUANTITY OR PRICE? OR FEATURE? OR TYPE?
S8     6568352   OFFER? OR COUNTEROFFER? OR BID OR BIDDING OR BIDS
S9    10470126   PRODUCT? ? OR GOOD? ? OR ITEM? ? OR WARE? OR MERCHANDI?
S10    1109455   (S4 OR S5)(2N)(PLURAL? OR SEVERAL OR VARIOUS OR MANY OR MU-
              LTIPL? OR NUMEROUS OR DIFFERENT? OR FIRST OR SECOND OR 1ST OR
               2ND OR ANOTHER OR SEPARATE? OR ALTERNAT?)
S11       6361   S10(10N)S2
S12        377   S11(15N)S3
S13        891   S11(10N)(S7 OR S9)
S14          3   S13(S)S6
S15         37   (S11(25N)S3)(S)S6
? show file
File  20:Dialog Global Reporter 1997-2003/Oct 01
         (c) 2003 The Dialog Corp.
File 476:Financial Times Fulltext 1982-2003/Oct 01
         (c) 2003 Financial Times Ltd
File 610:Business Wire 1999-2003/Oct 01
         (c) 2003 Business Wire.
File 613:PR Newswire 1999-2003/Oct 01
         (c) 2003 PR Newswire Association Inc
File 624:McGraw-Hill Publications 1985-2003/Sep 30
         (c) 2003 McGraw-Hill Co. Inc
File 634:San Jose Mercury  Jun 1985-2003/Sep 30
         (c) 2003 San Jose Mercury News
File 810:Business Wire 1986-1999/Feb 28
         (c) 1999 Business Wire
File 813:PR Newswire 1987-1999/Apr 30
         (c) 1999 PR Newswire Association Inc
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Set      Items    Description
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S2      126285    NEGOTIAT? OR BARGAIN? OR HAGGL?
S3      652560    AUCTION? OR TRADING OR TRADE? ?
S4     1847445    CONSUMER? OR USER? OR BUYER? OR PARTICIPANT? OR CUSTOMER? -
              OR CLIENT? OR SUBSCRIBER? OR MEMBER? ? OR INDIVIDUAL? OR PERS-
              ON? ? OR BIDDER?
S5      587731    MERCHANT? OR RETAILER? OR VENDOR? ? OR MANUFACTURER? OR SE-
              LLER? OR PARTY OR WHOLESALER? OR SUPPLIER?
S6       16243    BILATERAL? OR MULTILATERAL OR (BI OR MULTI)()LATERAL?
S7     2365045    ATTRIBUTE? OR QUANTITY OR PRICE? OR FEATURE? OR TYPE?
S8      767891    OFFER? OR COUNTEROFFER? OR BID OR BIDDING OR BIDS
S9     2001781    PRODUCT? ? OR GOOD? ? OR ITEM? ? OR WARE? OR MERCHANDI?
S10     115461    (S4 OR S5)(2N)(PLURAL? OR SEVERAL OR VARIOUS OR MANY OR MU-
              LTIPL? OR NUMEROUS OR DIFFERENT? OR FIRST OR SECOND OR 1ST OR
              2ND OR ANOTHER OR SEPARATE? OR ALTERNAT?)
S11         14    S1 AND S2
S12        606    S2 AND S3 AND S6
S13         11    S12 AND S10
S14       1870    S10 AND S2
S15        549    S14 AND S7
S16        159    S15 AND S8
S17         49    S16 AND S3
S18         38    (S17 OR S13) NOT PY>1999
S19         36    RD (unique items)
? show file
File   2:INSPEC 1969-2003/Sep W3
         (c) 2003 Institution of Electrical Engineers
File  35:Dissertation Abs Online 1861-2003/Sep
         (c) 2003 ProQuest Info&Learning
File  65:Inside Conferences 1993-2003/Sep W4
         (c) 2003 BLDSC all rts. reserv.
File  99:Wilson Appl. Sci & Tech Abs 1983-2003/Aug
         (c) 2003 The HW Wilson Co.
File 233:Internet & Personal Comp. Abs. 1981-2003/Jul
         (c) 2003, EBSCO Pub.
File 474:New York Times Abs 1969-2003/Sep 30
         (c) 2003 The New York Times
File 475:Wall Street Journal Abs 1973-2003/Sep 30
         (c) 2003 The New York Times
File 583:Gale Group Globalbase(TM) 1986-2002/Dec 13
         (c) 2002 The Gale Group
File 256:SoftBase:Reviews,Companies&Prods. 82-2003/Aug
         (c)2003 Info.Sources Inc
```

USPTO/ASRC Aerospace

EIC Reference Interview Form

SEARCHER: __Bode Akintola__	INTERVIEW DATE: ______
	OR
SERIAL #: ______	E-MAIL DATE: ______
	(ATTACH E-MAIL)
ACCESS #: ______	☐ EXAMINER NOT AVAILABLE
	☐ SRF SUFFICIENT

This form is used to provide supplementary information and clarify search requests. Questions that are clearly answered on theSearch Request Form need not be repeated. WRITE ADDITIONAL NOTES ON REVERSE.

QUESTION	✔ if on SRF	NOTES
PRELIMINARY STRATEGY Appropriate? Too Broad/Narrow? Good Example from Examiner's Search Results?		
NOVELTY Which concepts must be covered for a reference to be useful?		
APPLICATIONS How will this invention be applied? On which (if any) subject area or application should search focus?		
KEY TERMS Terms of Art/Acronyms/ Professional Jargon Synonyms Terms to avoid		
DATABASES Foreign Patents Internet Search (recommended search engines or websites)		
RESULTS FORMAT Y N Tagged? Y N Highlighted? Y N Include Inventor Search (if no valuable results) ?		
DATE What date would you like to use to limit the search?		**Priority Date:** ______ **Other Date:** ______

Search Chronology		**Type of Search**		**Vendors and cost where applicable**	
Date Searcher Picked Up:		NA Sequence (#)		STN	$
Date Completed:		AA Sequence (#)		Dialog	$
Searcher Prep & Review Time:		Structure (#)		Questel/Orbit	
Online Time:		Text	X	Lexis/Nexis	
Clerical Prep Time:		Litigation		Sequence Systems	
		Patent Family		WWW/Internet	
		Other		Other (specify)	

06/03/2003

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File 347:JAPIO Oct 1976-2003/Jun(Updated 031006)
         (c) 2003 JPO & JAPIO
File 350:Derwent WPIX 1963-2003/UD,UM &UP=200364
         (c) 2003  Thomson Derwent
File 256:SoftBase:Reviews,Companies&Prods. 82-2003/Sep
         (c)2003 Info.Sources Inc
File  35:Dissertation Abs Online 1861-2003/Sep
         (c) 2003 ProQuest Info&Learning
File 583:Gale Group Globalbase(TM) 1986-2002/Dec 13
         (c) 2002 The Gale Group
File  65:Inside Conferences 1993-2003/Oct W1
         (c) 2003 BLDSC all rts. reserv.
File   2:INSPEC 1969-2003/Sep W4
         (c) 2003 Institution of Electrical Engineers
File 233:Internet & Personal Comp. Abs. 1981-2003/Jul
         (c) 2003, EBSCO Pub.
File 474:New York Times Abs 1969-2003/Oct 08
         (c) 2003 The New York Times
File 475:Wall Street Journal Abs 1973-2003/Oct 08
         (c) 2003 The New York Times
File  99:Wilson Appl. Sci & Tech Abs 1983-2003/Aug
         (c) 2003 The HW Wilson Co.
File  95:TEME-Technology & Management 1989-2003/Sep W3
         (c) 2003 FIZ TECHNIK
File 139:EconLit 1969-2003/Sep
         (c) 2003 American Economic Association

Set     Items   Description
S1     324891    (MERGER? ?(1W)ACQUISITION? ?) OR TAKEOVER? OR TAKE()OVER? ?
                  OR REAL()(ESTATE OR PROPERT?)
S2    3140507   TRANSACT? OR EXCHANG? OR PURCHAS? OR BUYING OR BUY OR BOUG-
                 HT OR SELL OR SOLD OR SALE OR TRADE? ? OR TRADING OR CONTRACT?
                  OR DEAL? ?
S3     238242   NEGOTIAT? OR BARGAIN? OR HAGGLE? OR HAGGLING OR DEALING? ?
S4      90829   INACTIV? OR INTERTWIN? OR GAME()THEORY OR (SHOPPING OR SEA-
                 RCH??? OR SEEK? OR PURSUE? OR PURSUING OR BACKUP OR BACK()UP -
                 OR CONTINGEN? OR SEQUENTIAL? OR SWITCHABLE)(2W)(OFFER? ? OR C-
                 OUNTEROFFER? ?) OR OPENBID? ? OR OPEN()BID? ?
S5        417    (BILATERAL? OR MULTILATERAL? OR (2 OR TWO OR MULTI OR MANY-
                 )()SIDED OR SEVERAL OR NUMEROUS? OR PLURAL? OR MYRIAD)(1W)(OF-
                 FER? ? OR COUNTEROFFER? ?)
S6          0   S1 AND S2 AND S3 AND S4 AND S5
S7         12   S1 AND S2 AND S3 AND S4
S8          0   S7 FROM 347,350
S9          9   S7 NOT PY>1999
S10         9   RD (unique items)
S11        16   S1 AND (S3(5N)(S4 OR S5))
S12         0   S11 FROM 347,350
S13        12   S11 NOT S7
S14        12   S13 NOT PY>1999
S15        11   RD (unique items)
S16         2   (S3(5N)(S4 OR S5)) FROM 347,350
S17       263   S1 AND S4
S18        13   S17 FROM 347,350
S19         1   S18 AND (IC=G06F-017/60 OR MC=(T01-N01A2 OR T01-N01A OR T0-
                 1-J05A2B OR T01-J05A2A OR T01-J05A2 OR T01-J05A))
```

10/3,K/1 (Item 1 from file: 35)
DIALOG(R)File 35:Dissertation Abs Online

01721930 ORDER NO: AADAA-I9953536
Two essays in corporate finance
Author: Goldman, Eitan
Degree: Ph.D.
Year: 1999
Corporate Source/Institution: University of Pennsylvania (0175)
Source: VOLUME 60/12-A OF DISSERTATION ABSTRACTS INTERNATIONAL.
PAGE 4533. 88 PAGES

...managerial authority. We explore the choice of organizational form using a model in which agents **negotiate** prices on behalf of their principals when there is **trade** in a market. Admitting agency issues into price formation introduces a need for a principal...

...of information from market prices, information that can be used to reduce the cost of **contracting** . Hence, when the market is internalized within the firm, information from market prices is lost...

...Thus, the manager finds it optimal to pay dividends either during times in which the **takeover** market is relatively **inactive** or if the firms equity structure is one which consists of a small group of...

10/3,K/2 (Item 2 from file: 35)
DIALOG(R)File 35:Dissertation Abs Online

01479797 ORDER NO: AADAA-I9612874
REAL ESTATE **LEASING: SEARCH AND OPTIMAL** CONTRACT **DESIGN**
Author: YANG, SHIAWEE XIAOHUI
Degree: PH.D.
Year: 1995
Corporate Source/Institution: THE PENNSYLVANIA STATE UNIVERSITY (0176)
Source: VOLUME 57/01-A OF DISSERTATION ABSTRACTS INTERNATIONAL.
PAGE 376. 190 PAGES

REAL ESTATE **LEASING: SEARCH AND OPTIMAL** CONTRACT **DESIGN**

This dissertation focuses on specific formulations and characteristics of **contract bargaining** processes in **real estate** leasing markets. It is an attempt to apply the **contract bargaining** approach, the search approach and the **contract** mechanism design approach in microeconomics and **game theory** to the complex **real estate** lease **contracting** .

This dissertation examines three interrelated and yet relatively independent **contractual** problems in **real estate** leasing. First, the optimal price and **contract** length under the influence of **bargaining** power of the parties are investigated. Two theoretical models are developed and empirically verified using commercial **real estate** data. Second, the characteristics of the search behavior of agents in both leasing and **purchasing** markets are modeled, with no recall and with recall. The optimal search decisions are derived...

...agent. Numerical simulations demonstrate the significance of the proposition. Lastly, the mechanism design of the **contract** with a downsizing option is formulated; it demonstrates the adverse selection and optimal use of the leasing provision. The optimal **contract** rent is simulated with numerical assumptions, which is largely supported by empirical evidence from an endogenous switching regression model using commercial **real estate** data.

10/3,K/3 (Item 3 from file: 35)

DIALOG(R)File 35:Dissertation Abs Online

01109161 ORDER NO: AAD90-16441
THREE ESSAYS IN THE THEORY OF INDUSTRIAL ORGANIZATION (AGENCY THEORY, GAME THEORY **, GOLDEN PARACHUTES)**
Author: CHOI, BYUNG-IL
Degree: PH.D.
Year: 1989
Corporate Source/Institution: YALE UNIVERSITY (0265)
Source: VOLUME 51/02-A OF DISSERTATION ABSTRACTS INTERNATIONAL. PAGE 599. 147 PAGES

THREE ESSAYS IN THE THEORY OF INDUSTRIAL ORGANIZATION (AGENCY THEORY, GAME THEORY **, GOLDEN PARACHUTES)**

The dissertation consists of three self-contained essays, each of which **deals** with a different aspect of the theory of industrial organization.

The first essay studies the robustness of an earlier **contractual** equivalence result and asks under what circumstances can an optimal long-term **contract** be achieved by a series of short-term **contracts** , when surplus from the principal-agent framework is divided in an arbitrary manner? By using a cooperative **bargaining** solution that is sensitive to the threat point, we show that inabilities of **bargaining** parties to commit to a long-term **contract** has no distributional consequences nor any efficiency consequences.

The second essay addresses the value of...

...implications are not always clear-cut; in some situations Golden Parachutes may discourage socially desirable **takeovers** .

The third essay analyzes the adoption of a newly available technology by an incumbent and...

10/3,K/4 (Item 1 from file: 583)
DIALOG(R)File 583:Gale Group Globalbase(TM)

06274630
Dos emresarios catalanes presentan una oferta para comparar Yanko
SPAIN: OFFER TO **BUY** YANKO SHOES ANNOUNCED
El Pais (ELP) 27 Feb 1996 p.45
Language: SPANISH

SPAIN: OFFER TO **BUY** YANKO SHOES ANNOUNCED

Spanish shoe manufacturer of the Balearic Islands, Yanko, which has been **inactive** for the last two months and in suspended payment status since 1993, might be **sold** to two Catalonian businessmen, Joan Piguillem Garcia and Xavier Camp Vila, who are reportedly **negotiating** the **take over** with regional authorities. Yanko's debts total Pta 3,000mn.

10/3,K/5 (Item 1 from file: 2)
DIALOG(R)File 2:INSPEC

04219204 INSPEC Abstract Number: C9210-1290D-003
Title: A game-theoretic model for mergers **and** acquisitions
Author(s): van den Honert, R.C.; Stewart, T.J.
Author Affiliation: Dept. of Stat. Sci., Cape Town Univ., Rondebosch, South Africa
Journal: European Journal of Operational Research vol.59, no.2 p. 275-87
Publication Date: 10 June 1992 Country of Publication: Netherlands

CODEN: EJORDT ISSN: 0377-2217
U.S. Copyright Clearance Center Code: 0377-2217/92/$05.00
Language: English
Subfile: C

Title: A game-theoretic model for mergers **and** acquisitions
Abstract: The corporate merger process is modelled as a **bargaining** game under certainty. The distribution of gains between target and acquiring companies that would be...

... is fitted to empirical results from 24 mergers of companies quoted on the Johannesburg Stock **Exchange** . The model is shown to have good predictive power within this set of data.
...Descriptors: **game theory**
...Identifiers: **bargaining** game...

...Johannesburg Stock **Exchange**

10/3,K/6 (Item 1 from file: 474)
DIALOG(R)File 474:New York Times Abs

04540042 NYT Sequence Number: 995827850917
Carlsberg Corp says it has suspended negotiations **to** buy **36.7 percent interest in the company held by one part of Carlsberg family; says it plans, instead, to to** seek offers **from outsiders to** buy **all of company's stock (S))**
New York Times, Col. 6, Pg. 5, Sec. 4
Thursday June 27 1985

Carlsberg Corp says it has suspended negotiations **to** buy **36.7 percent interest in the company held by one part of Carlsberg family; says it plans, instead, to to** seek offers **from outsiders to** buy **all of company's stock (S))**

DESCRIPTORS: **MERGERS** , **ACQUISITIONS** AND DIVESTITURES; STOCKS AND BONDS

10/3,K/7 (Item 1 from file: 139)
DIALOG(R)File 139:EconLit

473272
TITLE: Strategic Bargaining **and Competitive Bidding in a Dynamic Market Equilibrium**
AUTHOR(S): Coles, Melvyn G.; Muthoo, Abhinay
AUTHOR(S) AFFILIATION: CSIC, Barcelona and U Essex; U Essex
JOURNAL NAME: Review of Economic Studies,
JOURNAL VOLUME & ISSUE: 65 2,
PAGES: 235-60
PUBLICATION DATE: 1998
AVAILABILTY: Publisher's URL
ISSN: 0034-6527
DOCUMENT TYPE: Journal Article
ABSTRACT INDICATOR: Abstract

TITLE: Strategic Bargaining **and Competitive Bidding in a Dynamic Market Equilibrium**
ABSTRACT: This paper extends the **bargaining** and matching literature, such as Rubinstein and Wolinsky (1985), by considering a new matching process. The authors assume that a central information agency exists, such as **real estate** agencies in the housing market and employment agencies (or newspapers) in the labor market, which puts traders into

direct contact with each other. With heterogeneity of **trader** preference, equilibrium **trade** is characterized by existing traders on each side of the market trying to match with...

... other side (since existing traders have already sampled and rejected each other). Two procedures of **trade** co-exist, namely a strategic bilateral **bargaining** process and a competitive bidding process, depending on the number of potential matches a new **trader** obtains. The authors characterize the unique symmetric Markov perfect equilibrium to this stochastic **trading** game.
DESCRIPTOR(S) (1991 to Present): **Bargaining** Theory; Matching Theory...

...C780); **Exchange** and Production Economies...
DESCRIPTOR(S) (Pre-1991): **Game** **Theory** and **Bargaining** Theory...
KEYWORD DESCRIPTOR(S) (1991 to Present): **Bargaining** ; Bidding; Equilibrium; Matching

10/3,K/8 (Item 2 from file: 139)
DIALOG(R)File 139:EconLit

318770
TITLE: The Division of Takeover **Gains in Sweden**
AUTHOR(S): Rydqvist, Kristian
AUTHOR(S) AFFILIATION: Stockholm School of Econ
PUBLICATION INFORMATION: Centre for Economic Policy Research, European Science Foundation, Working Paper: 31 PAGES: 23
PUBLICATION DATE: February 1993
AVAILABILTY: Copies available from: Centre for Economic Policy Research, 25-28 Old Burlington Street, London W1X 1LB, England
PRICE: not available
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

TITLE: The Division of Takeover **Gains in Sweden**
ABSTRACT: The paper estimates the gains from **takeover** in a sample of Swedish public-tender offers and analyzes its division between target and...

... in minority buyouts, and that target shareholders collect approximately 80% of the gain in both **transaction** types. The skewed division of the gain is surprising given that the tender offer prices in our data are bilaterally **negotiated** between the bidder and the target. A free-riding-type model designed for the Swedish institutional environment is developed to explain how bilateral **negotiations** can systematically give one party a larger share of the gain from **trade** .
DESCRIPTOR(S) (1991 to Present): **Mergers** ; **Acquisitions** ; Restructuring; Voting; Proxy Contests...

...G120); **Bargaining** Theory; Matching Theory...
...DESCRIPTOR(S) (Pre-1991): 3131); **Game** **Theory** and **Bargaining** Theory...

10/3,K/9 (Item 3 from file: 139)
DIALOG(R)File 139:EconLit

229949
TITLE: The informational role of prices
AUTHOR(S): Grossman, Sanford J.
PUBLICATION INFORMATION: Wicksell Lectures Cambridge, Mass. and London: MIT Press, PAGES: x, 218
PUBLICATION DATE: 1989
ISBN: 0-262-07121-5

DOCUMENT TYPE: Book
ABSTRACT INDICATOR: Abstract

ABSTRACT: Eight revised papers united by the common theme that the very activity of **trading** conveys information that affects the outcome of the activity. Elaborates a model of economic equilibrium...

... also convey information about what others consider to be the value of the goods being **sold** . Topics include the rational expectations model under asymmetric information; results on the informational efficiency of...

... noisy rational expectations, and informational externalities; the impossibility of informationally efficient markets; implications of program **trading** and dynamic hedging strategies for stock and futures price volatility; the allocational role of **takeover** bids in situations of asymmetric information; the informational role of warranties and private disclosure about...
...DESCRIPTOR(S) (Pre-1991): 3130); Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/1 (Item 1 from file: 139)
DIALOG(R)File 139:EconLit

382802
TITLE: Threat to Regulate and Coordination Failures: Experimental Evidence
AUTHOR(S): Sefton, Martin; Yavas, Abdullah
AUTHOR(S) AFFILIATION: U Manchester; Smeal College of Business Administration, PA State U
JOURNAL NAME: Journal of Real Estate Finance and Economics,
JOURNAL VOLUME & ISSUE: 12 1,
PAGES: 97-115
PUBLICATION DATE: January 1996
ISSN: 0895-5638
DOCUMENT TYPE: Journal Article
ABSTRACT INDICATOR: Abstract

ABSTRACT: Coordination games can represent a wide range of issues in **real estate** . In this paper, we present the results of an experiment designed to investigate the impact...
...DESCRIPTOR(S) (Pre-1991): 6190); **Game Theory** and **Bargaining** Theory...

15/3,K/2 (Item 2 from file: 139)
DIALOG(R)File 139:EconLit

375622
TITLE: When Are Agents Negligible?
AUTHOR(S): Levine, David K.; Pesendorfer, Wolfgang
AUTHOR(S) AFFILIATION: UCLA; Northwestern U
JOURNAL NAME: American Economic Review,
JOURNAL VOLUME & ISSUE: 85 5,
PAGES: 1160-70
PUBLICATION DATE: December 1995
ISSN: 0002-8282
DOCUMENT TYPE: Journal Article
ABSTRACT INDICATOR: Abstract

...ABSTRACT: several economic examples in which this paradox has recently received attention: durable-goods monopoly, corporate **takeovers** , and time consistency of optimal government policy.
DESCRIPTOR(S) (Pre-1991): **Game Theory** and **Bargaining** Theory...

15/3,K/3 (Item 3 from file: 139)
DIALOG(R)File 139:EconLit

328354
TITLE: Rent Division, Restructuring, and Managerial Risk Taking: A Strategic Bargaining Model
AUTHOR(S): Noe, Thomas H.; Rebello, Michael J.
AUTHOR(S) AFFILIATION: GA State U; GA State U
JOURNAL NAME: Journal of Economics and Management Strategy,
JOURNAL VOLUME & ISSUE: 2 2,
PAGES: 245-76
PUBLICATION DATE: Summer 1993
ISSN: 1058-6407
DOCUMENT TYPE: Journal Article
ABSTRACT INDICATOR: Abstract

DESCRIPTOR(S) (1991 to Present): **Mergers** ; **Acquisitions** ; Restructuring; Voting; Proxy Contests...
...DESCRIPTOR(S) (Pre-1991): 5100); **Game Theory** and **Bargaining**

Theory...

15/3,K/4 (Item 4 from file: 139)
DIALOG(R)File 139:EconLit

309162
TITLE: Raiders, Junk Bonds and Risk
AUTHOR(S): Craine, Roger; Steigerwald, Douglas
AUTHOR(S) AFFILIATION: U CA, Berkeley; U CA, Berkeley
PUBLICATION INFORMATION: University of California at Berkeley Working Paper in Economics: 8893 PAGES: 24
PUBLICATION DATE: October 1988
AVAILABILTY: Copies available from: IBER, 156 Barrows Hall, University of California at Berkeley, Berkeley 94720
PRICE: $3.50
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

ABSTRACT: This paper examines the effect of financing on risk in a disciplinary **takeover** . The famous Modigliani-Miller theorem on the irrelevance of the firm's financial structure assumes...

... of the activities of the firm. Asymmetric information creates the opportunity for a rational disciplinary **takeover** and makes the debt-to-equity ratio and the operating strategy endogenous and interdependent. The buyers of junk bonds financing a **takeover** precommit to a risk premium and then the raider chooses an operating strategy. The sequential...

... Instead he sends a credible signal to lenders by increasing the equity stake in the **takeover** .
DESCRIPTOR(S) (Pre-1991): Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/5 (Item 5 from file: 139)
DIALOG(R)File 139:EconLit

308466
TITLE: On the Efficiency of Takeovers
AUTHOR(S): Nagarajan, S.
AUTHOR(S) AFFILIATION: Columbia Business School
PUBLICATION INFORMATION: Columbia First Boston Series in Money, Economics and Finance Working Paper: FB-88-27 PAGES: 88
PUBLICATION DATE: May 1988
AVAILABILTY: Copies available from: First Boston Series, Graduate School of Business, Columbia University, New York, NY 10027
PRICE: $5.00 academics and non-profit institutions; $6.00 corporations (add $1.00 outside United States, Canada and Puerto Rico)
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

TITLE: On the Efficiency of Takeovers
ABSTRACT: This paper examines the issue of the welfare efficiency of **takeovers** and resistance strategies such as greenmail and supermajority rules for a fairly large class of **takeover** games under incomplete information. Application of the well-known Revelation Principle reduces the problem to...
... premiums, the resulting fall in the stock price not withstanding, are not inconsistent with efficient **takeovers** . However, economy-wide payment of greenmail would reduce the set of firms which could be...
...DESCRIPTOR(S) (Pre-1991): 5140); Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/6 (Item 6 from file: 139)
DIALOG(R)File 139:EconLit

308353
TITLE: A Theory of Preemptive Takeover **Bidding**
AUTHOR(S): Fishman, Michael J.
AUTHOR(S) AFFILIATION: Northwestern U
PUBLICATION INFORMATION: Northwestern Center for Mathematical Studies in Economics and Management Science Working Paper: 670 PAGES: 38
PUBLICATION DATE: December 1985
AVAILABILTY: Copies available from: Managerial Economics and Decisions Sciences, Kellogg Graduate School of Management, Northwestern University, 2001 Sheridan Road, Evanston IL 60201
PRICE: No Charge
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

TITLE: A Theory of Preemptive Takeover **Bidding**
ABSTRACT: This paper develops a model of the **takeover** bidding process. The model is one of strategic bidding among competing bidders, in an environment...

... targets' profits and (1) bidders' initial offers, (2) single and multiple bidder contests, and (3) **takeovers** which occurred before and after the enactment of **takeover** legislation are developed. Additionally, the model provides a rationale for bidders to make high premium...
DESCRIPTOR(S) (Pre-1991): Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/7 (Item 7 from file: 139)
DIALOG(R)File 139:EconLit

308045
TITLE: Successful Takeovers **without Exclusion**
AUTHOR(S): Bagnoli, Mark; Lipman, Barton L.
AUTHOR(S) AFFILIATION: U MI; Carnegie-Mellon U
PUBLICATION INFORMATION: University of Michigan Center for Research on Economic and Social Theory Working Paper: 87-13 PAGES: 25
PUBLICATION DATE: August 1987
AVAILABILTY: Copies available from: Department of Economics, University of Michigan, Ann Arbor, Michigan 48109
PRICE: No Charge
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

TITLE: Successful Takeovers **without Exclusion**
ABSTRACT: We noted at the outset that most of the literature on **takeovers** assumes atomistic stockholders. As we pointed out, however, there are many large firms for which...

... models. In particular, because some stockholders must be pivotal and hence cannot free ride, successful **takeovers** are possible without exclusion. Since the equilibrium outcome in the finite stockholder game is quite...

... We argued that atomistic stockholder models may provide a reasonable approximation to the outcome for **takeovers** with any-and-all bids if the firm is not sufficiently valuable relative to the...

... likely to provide a more accurate prediction, so that exclusion is not

necessary for successful **takeovers** . Since, all else equal, stockholders generally benefit more from **takeovers** without exclusion, our analysis suggests that stockholders would prefer to invest in firms which are...
...DESCRIPTOR(S) (Pre-1991): 3130); Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/8 (Item 8 from file: 139)
DIALOG(R)File 139:EconLit

305388
TITLE: Predation, Mergers and Incomplete Information
AUTHOR(S): Saloner, Garth
AUTHOR(S) AFFILIATION: MIT and National Fellow Hoover Institution, and Stanford U
PUBLICATION INFORMATION: Stanford Hoover Institute Working Paper in Economics: E-86-70 PAGES: 58
PUBLICATION DATE: December 1986
AVAILABILTY: Copies available from: Domestic Studies Program Working Paper Series, Hoover Institution, Stanford University, Stanford, CA 94305
PRICE: No Charge
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

ABSTRACT: This paper examines the strategic pricing of duopolists in anticipation of a **takeover** of one of them by the other. In equilibrium the acquiring firm may expand its...

...in order to signal that it is a low cost rival and thereby improve the **takeover** terms. If the merged firm will face potential entry, a pre-merger expansion of output...
... In that case the acquiring firm's output expansion increases industry concentration by facilitating the **takeover** and by deterring entry. This establishes the rationality of predatory output expansions - even when a merger or **takeover** is possible and, indeed, anticipated.
...DESCRIPTOR(S) (Pre-1991): 6120); Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/9 (Item 9 from file: 139)
DIALOG(R)File 139:EconLit

302239
TITLE: Imperfect Information and the Tender Offer Auction
AUTHOR(S): Schwartz, Alan
AUTHOR(S) AFFILIATION: CA Institute of Technology
PUBLICATION INFORMATION: Caltech Social Science Working Paper: 566 PAGES: 64
PUBLICATION DATE: April 1985
AVAILABILTY: Copies available from: Division of Humanities and Social Sciences, California Institute of Technology, Pasadena, CA 91125
PRICE: No Charge
DOCUMENT TYPE: Working Paper
ABSTRACT INDICATOR: Abstract

ABSTRACT: Managers of companies for which **takeover** bids have been or are likely to be made -- "targets" -- engage in a variety of tactics designed to minimize the likelihood of a **takeover** or increase the price an acquirer must ultimately pay. The welfare effects of these tactics...

... uses. Further, the shareholders of targets do not have property rights to the gains from **takeovers** that auctions could be viewed as

protecting. Hence, the law that now permits auctions to...
DESCRIPTOR(S) (Pre-1991): Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General...

15/3,K/10 (Item 10 from file: 139)
DIALOG(R)File 139:EconLit

291340
TITLE: When Will Residential Mortgage Underwriting Come of Age?
AUTHOR(S): Guttentag, Jack M.
AUTHOR(S) AFFILIATION: U PA
JOURNAL NAME: Housing Policy Debate,
JOURNAL VOLUME & ISSUE: 3 1,
PAGES: 143-56
PUBLICATION DATE: 1992
ISSN: 1051-1482
DOCUMENT TYPE: Journal Article
ABSTRACT INDICATOR: Abstract

...DESCRIPTOR(S) (1991 to Present): G210); **Real Estate** Services...
...DESCRIPTOR(S) (Pre-1991): 3120); Industry Studies--Services-- **Real Estate** (...

...5110); Economics of Uncertainty and Information; **Game Theory** and **Bargaining** Theory: General

15/3,K/11 (Item 11 from file: 139)
DIALOG(R)File 139:EconLit

199933
TITLE: Ownership Concentration and the Theory of the Firm: A Simple-Game-Theoretic Approach
AUTHOR(S): Leech, Dennis
JOURNAL NAME: Journal of Industrial Economics,
JOURNAL VOLUME & ISSUE: 35 3,
PAGES: 225-40
PUBLICATION DATE: March 1987
ISSN: 0022-1821
DOCUMENT TYPE: Journal Article
ABSTRACT INDICATOR: Abstract

...ABSTRACT: in terms of the relationship between shareholding concentration and corporate control. A unified perspective (including **takeovers** as a special case) is developed whereby leading coalitions are costly to form and possess...
DESCRIPTOR(S) (Pre-1991): **Game Theory** and **Bargaining** Theory...

16/3,K/1 (Item 1 from file: 347)
DIALOG(R)File 347:JAPIO

07164180 **Image available**
DEALING SYSTEM AND RECORDING MEDIUM

PUB. NO.:	2002-032564 [JP 2002032564 A]
PUBLISHED:	January 31, 2002 (20020131)
INVENTOR(s):	UENOHARA YUJI
	ONISHI MOTOHIKO
	TATSUMI TAKAHIRO
	OHASHI TADAHIRO
	KAWASHIMA MASATOSHI
	OKUDA HIROAKI
APPLICANT(s):	TOSHIBA CORP
APPL. NO.:	2000-219655 [JP 2000219655]
FILED:	July 19, 2000 (20000719)

ABSTRACT
... market that is adaptive to large price fluctuation of the original assets as that the **inactive** transactions.

SOLUTION: In this **dealing** system 100, the calculation engine 103 of financial engineering is applied to an option price...

16/3,K/2 (Item 1 from file: 350)
DIALOG(R)File 350:Derwent WPIX

014364805 **Image available**
WPI Acc No: 2002-185506/200224
Method for advertising of company
Patent Assignee: KIM H T (KIMH-I); LEE S Y (LEES-I); MOON K J (MOON-I)
Inventor: KIM H T; LEE S Y; MOON K J
Number of Countries: 001 Number of Patents: 001
Patent Family:

Patent No	Kind	Date	Applicat No	Kind	Date	Week	
KR 2001025698	A	20010406	KR 20012868	A	20010118	200224	B

Priority Applications (No Type Date): KR 20012868 A 20010118
Patent Details:

Patent No	Kind	Lan	Pg	Main IPC	Filing Notes
KR 2001025698	A		1	G06F-017/6006	

Abstract (Basic):
... searching unit by regions(10) and the searching unit by business types(30). The others **searching** unit(60) **offers** an event, a **bargain** sale and personal information. A promising business introduction unit(70) introduces a promising business by...

19/3,K/1 (Item 1 from file: 350)
DIALOG(R)File 350:Derwent WPIX

014650415 **Image available**
WPI Acc No: 2002-471119/200250
Related WPI Acc No: 2002-471126
XRPX Acc No: N02-371961

Information closure model creation method for searching shopping, real estate **information in Internet, involves removing rows of information having identical fields from accepted row list**

Patent Assignee: AMAZON.COM INC (AMAZ-N)
Inventor: GUPTA A; NORVIG P; RAJARAMAN A
Number of Countries: 001 Number of Patents: 002
Patent Family:

Patent No	Kind	Date	Applicat No	Kind	Date	Week	
US 20020062222	A1	20020523	US 9766125	P	19971121	200250	B
			US 98196026	A	19981119		
			US 2001235	A	20011130		
US 6539378	B2	20030325	US 9766125	P	19971121	200325	
			US 98196026	A	19981119		
			US 2001235	A	20011130		

Priority Applications (No Type Date): US 9766125 P 19971121; US 98196026 A 19981119; US 2001235 A 20011130
Patent Details:

Patent No	Kind	Lan	Pg	Main IPC	Filing Notes
US 20020062222	A1		22	G06F-017/60	Provisional application US 9766125
					Cont of application US 98196026
US 6539378	B2			G06F-017/30	Provisional application US 9766125
					Cont of application US 98196026

Information closure model creation method for searching shopping, real estate **information in Internet, involves removing rows of information having identical fields from accepted row list**

Abstract (Basic):
... information retrieved from semi-structured source such as web pages for searching information related to **real estate** , **shopping** , job **offer** , etc...
...International Patent Class (Main): **G06F-017/60**

```
File 348:EUROPEAN PATENTS 1978-2003/Sep W04
         (c) 2003 European Patent Office
File 349:PCT FULLTEXT 1979-2002/UB=20031002,UT=20030925
         (c) 2003 WIPO/Univentio
File  15:ABI/Inform(R) 1971-2003/Oct 07
         (c) 2003 ProQuest Info&Learning
File   9:Business & Industry(R) Jul/1994-2003/Oct 07
         (c) 2003 Resp. DB Svcs.
File 610:Business Wire 1999-2003/Oct 08
         (c) 2003 Business Wire.
File 810:Business Wire 1986-1999/Feb 28
         (c) 1999 Business Wire
File 275:Gale Group Computer DB(TM) 1983-2003/Oct 07
         (c) 2003 The Gale Group
File 476:Financial Times Fulltext 1982-2003/Oct 08
         (c) 2003 Financial Times Ltd
File 624:McGraw-Hill Publications 1985-2003/Oct 07
         (c) 2003 McGraw-Hill Co. Inc
File 636:Gale Group Newsletter DB(TM) 1987-2003/Oct 07
         (c) 2003 The Gale Group
File 621:Gale Group New Prod.Annou.(R) 1985-2003/Oct 08
         (c) 2003 The Gale Group
File 613:PR Newswire 1999-2003/Oct 08
         (c) 2003 PR Newswire Association Inc
File 813:PR Newswire 1987-1999/Apr 30
         (c) 1999 PR Newswire Association Inc
File  16:Gale Group PROMT(R) 1990-2003/Oct 06
         (c) 2003 The Gale Group
File 160:Gale Group PROMT(R) 1972-1989
         (c) 1999 The Gale Group
File 634:San Jose Mercury  Jun 1985-2003/Oct 06
         (c) 2003 San Jose Mercury News
File 148:Gale Group Trade & Industry DB 1976-2003/Oct 08
         (c)2003 The Gale Group
File  20:Dialog Global Reporter 1997-2003/Oct 08
         (c) 2003 The Dialog Corp.
File 625:American Banker Publications 1981-2003/Oct 08
         (c) 2003 American Banker
File 268:Banking Info Source 1981-2003/Sep W4
         (c) 2003 ProQuest Info&Learning
File 626:Bond Buyer Full Text 1981-2003/Oct 08
         (c) 2003 Bond Buyer
File 267:Finance & Banking Newsletters 2003/Oct 06
         (c) 2003 The Dialog Corp.

Set     Items   Description
S1      24051   ((MERGER? ?(1W)ACQUISITION? ?) OR TAKEOVER? OR TAKE()OVER?
                 ? OR REAL()(ESTATE OR PROPERT?))(3N)(NEGOTIAT? OR BARGAIN? OR
                 HAGGLE? OR HAGGLING OR DEALING? ?)
S2          0   S1(10N)(INACTIV? OR INTERTWIN? OR GAME()THEORY OR (SHOPPING
                 OR SEARCH??? OR SEEK? OR PURSUE? OR PURSUING OR BACKUP OR BA-
                 CK()UP OR CONTINGEN? OR SEQUENTIAL? OR SWITCHABLE)(2W)(OFFER?
                 ? OR COUNTEROFFER? ?) OR OPENBID? ? OR OPEN()BID? ?)
S3          0   S1(10N)((BILATERAL? OR MULTILATERAL? OR (2 OR TWO OR MULTI
                 OR MANY)()SIDED OR SEVERAL OR NUMEROUS? OR PLURAL? OR MYRIAD)-
                 (1W)(OFFER? ? OR COUNTEROFFER? ?))
S4          7   S1(S)(INACTIV? OR INTERTWIN? OR GAME()THEORY OR (SHOPPING -
                 OR SEARCH??? OR SEEK? OR PURSUE? OR PURSUING OR BACKUP OR BAC-
                 K()UP OR CONTINGEN? OR SEQUENTIAL? OR SWITCHABLE)(2W)(OFFER? ?
                 OR COUNTEROFFER? ?) OR OPENBID? ? OR OPEN()BID? ?)
S5          0   S1(S)((BILATERAL? OR MULTILATERAL? OR (2 OR TWO OR MULTI OR
                 MANY)()SIDED OR SEVERAL OR NUMEROUS? OR PLURAL? OR MYRIAD)(1-
                 W)(OFFER? ? OR COUNTEROFFER? ?))
S6          3   S4 NOT PY>1999
S7          2   RD (unique items)
S8        291   (NEGOTIAT? OR BARGAIN? OR HAGGLE? OR HAGGLING OR DEALING? -
```

		?)(3N)(INACTIV? OR INTERTWIN? OR GAME()THEORY OR OPENBID? ? OR OPEN()BID? ?)
S9	64	(NEGOTIAT? OR BARGAIN? OR HAGGLE? OR HAGGLING OR DEALING? ?)(3N)((SHOPPING OR SEARCH??? OR BACKUP OR BACK()UP OR CONTINGEN? OR SEQUENTIAL? OR SWITCHABLE)(2W)(OFFER? ? OR COUNTEROFFER? ?))
S10	69	(S8 OR S9) AND (MERGER? ?(1W)ACQUISITION? ? OR TAKEOVER? OR TAKE()OVER? ? OR REAL()(ESTATE OR PROPERT?))
S11	1	S10 FROM 348,349
S12	68	S10 NOT S11
S13	43	RD (unique items)
S14	2	S13 AND PD<19990713

EKD October 8, 2003

7/3,K/1 (Item 1 from file: 15)
DIALOG(R)File 15:ABI/Inform(R)

01360381 00-11368
The principle of rank substitution
Wilson, Donald C
Appraisal Journal v65n1 PP: 43-54 Jan 1997
ISSN: 0003-7087 JRNL CODE: APJ
WORD COUNT: 7091

...TEXT: models that appraisers may use to narrow the bounded price range to a point estimate. **Game theory** ranges from brutally simple games to esoterically complex ones. Most developed so far (e.g...

... far more life-like simulations) have been developed for bargaining applications in fields other than **real estate** appraisal. **Bargaining** games for **real estate** consistent with the PRS will specify players, actions, rules, information, payoffs, and outcomesthe traditional elements of **game theory** . The bargaining game will be further specified by the conditions of the appropriate value definition...intelligently (although it certainly helps), each appraiser will not have to become an expert in **game theory** and game construction to make intelligent use of bargaining models (although it certainly would not...

7/3,K/2 (Item 1 from file: 9)
DIALOG(R)File 9:Business & Industry(R)

2422619 Supplier Number: 02422619
UNIHOST SUITOR SIGNS PACT
(W-Westmont Corp (Toronto) has agreed not to buy additional shares of UniHost Corp (Mississauga) for 70 days while it negotiates a possible takeover deal)
Globe & Mail, p B5
March 16, 1999
DOCUMENT TYPE: Regional Newspaper ISSN: 0319-0714 (Canada)
LANGUAGE: English RECORD TYPE: Abstract

ABSTRACT:
...agreed not to buy additional shares of UniHost Corp. (Mississauga) for 70 days while it **negotiates** a possible **takeover** deal. The standstill agreement gives W-Westmont access to a data room set up by...

...offer for the remaining shares. UniHost has adopted a poison pill to gain time to **seek** other **offers** .

11/3,K/1 (Item 1 from file: 349)
DIALOG(R)File 349:PCT FULLTEXT

00733730 **Image available**
AUTOMATED FINANCIAL SCENARIO MODELING AND ANALYSIS TOOL HAVING AN INTELLIGENT GRAPHICAL USER INTERFACE
OUTIL DE MODELISATION ET D'ANALYSE DE SCENARIO FINANCIER AUTOMATIQUE A INTERFACE GRAPHIQUE D'UTILISATEUR INTELLIGENTE
Patent Applicant/Assignee:
BABCOCK & BROWN INC, 2 Harrison Street, San Francisco, CA 94105, US, US (Residence), US (Nationality), (For all designated states except: US)
Patent Applicant/Inventor:
BELCSAK Ladislav V, 1670 Green Street, San Francisco, CA 94123, US, US (Residence), US (Nationality), (Designated only for: US)
LEE Luke, 574 Versailles Lane, Fairfield, CA 94585, US, US (Residence), US (Nationality), (Designated only for: US)
COLLOP David J, 1862 Drake Drive, Oakland, CA 94611, US, US (Residence), US (Nationality), (Designated only for: US)
BEWSHER Mark R, 1810 Mountain View Drive, Tiburon, CA 94920, US, US (Residence), US (Nationality), (Designated only for: US)
NIEMIRA Thadeus H, 2490 Princeton Drive, San Bruno, CA 94066, US, US (Residence), US (Nationality), (Designated only for: US)
MORITZ Dennis D, 28 Skyview Terrace, San Rafael, CA 94903, US, US (Residence), US (Nationality), (Designated only for: US)
COHN Stephen G, 29 La Fond Lane, Orinda, CA 94563, US, US (Residence), US (Nationality), (Designated only for: US)
Legal Representative:
PRESTA Joseph S (agent), Nixon & Vanderhye P.C., Suite 800, 1100 North Glebe Road, Arlington, VA 22201-4714, US,
Patent and Priority Information (Country, Number, Date):
Patent: WO 200046717 A2 20000810 (WO 0046717)
Application: WO 2000US2776 20000203 (PCT/WO US0002776)
Priority Application: US 99118743 19990205
Designated States: AE AL AM AT AU AZ BA BB BG BR BY CA CH CN CR CU CZ DE DK DM EE ES FI GB GD GE GH GM HR HU ID IL IN IS JP KE KG KP KR KZ LC LK LR LS LT LU LV MA MD MG MK MN MW MX NO NZ PL PT RO RU SD SE SG SI SK SL TJ TM TR TT TZ UA UG US UZ VN YU ZA ZW
(EP) AT BE CH CY DE DK ES FI FR GB GR IE IT LU MC NL PT SE
(OA) BF BJ CF CG CI CM GA GN GW ML MR NE SN TD TG
(AP) GH GM KE LS MW SD SL SZ TZ UG ZW
(EA) AM AZ BY KG KZ MD RU TJ TM
Publication Language: English
Filing Language: English
Fulltext Word Count: 41743

Fulltext Availability:
Detailed Description

Detailed Description
... financial instruments, the system may also include instruments for advanced corporate finance operations, such as **mergers** , **acquisitions** and the like.

The next chapter is the Smart Paper chapter (see Figs. 20 & 25...in tax-motivated transactions. The system also sorts constraints by failing, binding, non-binding, and **inactive** . This helps **negotiators** identify the critical points in their deals, or helps a user figure out why his...

14/3,K/1 (Item 1 from file: 15)
DIALOG(R)File 15:ABI/Inform(R)

00779794 94-29186
After Madrid and Maastricht ... Should we rethink negotiations?
Garson, Jose; Quillien, Jenny
European Business Review v93n4 PP: 19-25 1993
ISSN: 0955-534X JRNL CODE: EBR
WORD COUNT: 3796

TEXT: For years now, the major model for exploring the way **negotiations** function has been **Game Theory** . There is no doubt that Game Theory has added much to our understanding of negotiations...

... table? What are we to make of the agitated debates in Europe over the Maastricht **negotiations** ? Does **Game Theory** help us to understand why the home countries have been so reluctant to follow their...

... for salary increases, for priority placement, for new computer support systems, for the price of **real estate** (be it a house lot or the Louisiana Purchase), for cease-fires, and for recognition...In the business arena, negotiations must also take place in spite of totally opposing positions. **Mergers** and **acquisitions** offer many examples. We need only to think of Jimmy Goldsmith and the BAT group...organizational rules going to be?

THE NEGOTIATION IN PROCESS OR AN ORGANIZATION AT WORK

Traditional **Game Theory** visualizes each **negotiator** as having a set of expected payoffs and the negotiation process is visualized using a...

930000

14/3,K/2 (Item 1 from file: 625)
DIALOG(R)File 625:American Banker Publications

0055952
Is Securities Industry Tiring Of Long Glass-Steagall Fight?: Cracks Appear in Law Separating Banks, Wall Street
American Banker - September 25, 1986; Pg. 1; Vol. 151, No. 188
WORD COUNT: 1,223

BYLINE:
By ANDREW ALBERT

TEXT:
...s most venerable
commercial banks, is being seriously considered for membership in the SIA.
Such **intertwining dealings** make it increasingly difficult for the SIA
or any other broad-based group to support...

...more are finding themselves sharing deals and using each others resources.
"We not trying to **take over** the SIA," David W. Fisher, head of J.P. Morgan Securities Inc., said with a...

Insights
August, 1998

Mergers & Acquisitions

*2 ANATOMY OF THE NO-SHOP PROVISION

Paul S. Bird, Andrew L. Bab [FNa1]

The complexity of fiduciary duty law in the change of control context, as well as the variety of circumstances that influence such transactions, make the **negotiation** of **no-shop** and related provisions very difficult. The following article addresses some of the most important issues that might arise in **negotiating** such provisions.

"**No-shop**" clauses and the related "fiduciary out", [FN1] termination, and termination fee provisions are often the most highly negotiated terms in a merger agreement. What makes these provisions so challenging to negotiate are the competing objectives--some common to both the acquiror and the target--that these contract terms are intended to achieve. To obtain some measure of exclusivity, the acquiror will prefer a broad no-shop provision and a narrow fiduciary out, while the target, to preserve some measure of flexibility in responding to other offers, will often seek the reverse. On the other hand, both the target and the acquiror may want to discourage potential third party bidders from interfering with their transaction with a strong no-shop provision and a large termination fee. The parties' interests may also be aligned where the target perceives that a tight no-shop clause and a termination fee are required to reach agreement with an acquiror concerned about its high up-front costs and its reputation, which may be at stake if it is perceived as a "stalking horse." Conversely, both parties may want a less restrictive fiduciary out and a lower termination fee in order to avoid having the provisions declared invalid. [FN2] Moreover, the circumstances surrounding the transaction (such as whether an auction has been conducted) can lead the parties to create fewer obstacles to third party offers in order to limit shareholder suits which may disrupt or prevent the merger. Loosening the no- shop clause might then be in both parties' interests.

Given these competing concerns, proper lawyering in this area depends on understanding the relationship between the parties and the interests most important to the client's board of directors. There is no single "ideal no-shop clause." Accordingly, this article aims to identify the more significant issues that arise in the course of negotiations and to suggest rationales for different positions that are often taken. But first a brief summary of the relevant law is needed to create the framework for the contract provisions.

The Legal Framework

The directors of a Delaware corporation [FN3] owe stockholders the twin fiduciary duties of care and loyalty. [FN4] A great deal of ink has been spilled trying to fashion a consistent and coherent system for applying these fiduciary principles (along with the judicially-created business judgment rule), particularly in the context of changes in corporate control. In part, this is due to the variety and complexity of merger and acquisition transactions; in part it has to do with the rapidly developing techniques and strategies used in the mergers and

acquisitions business. For directors and advisors alike, an important lesson to be learned from such leading Delaware fiduciary duty cases as Unocal [FN5] and Revlon [FN6] is that the guiding principles governing a target board's exercise of its fiduciary duties in the context of a change in corporate control are simply guidelines; what a board should and should not do will be especially susceptible to the circumstances surrounding the particular change in control.

The core principle guiding the drafting of the no-shop, fiduciary out, and related clauses arises from the target board's Revlon duties. Revlon stands for the oft-quoted proposition that once it is recognized that the corporation is "for sale," the "directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." [FN7] More recent cases have enlarged upon this theme. Thus, directors need only seek "the best value reasonably available to the stockholders," [FN8] "provided the price is offered by a reputable and responsible bidder." [FN9]

Courts have identified at least three scenarios that trigger Revlon duties: "(1) when a corporation initiates an active bidding process seeking to sell itself; (2) when, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or *3 (3) when approval of a transaction results in a sale or change of control." [FN10] Whether a company signs a merger agreement after an "active bidding process" or in response to an unsolicited but friendly offer, the target board's Revlon duties would seem to require that the board have an escape hatch from any no-shop clause in the agreement. If the board cannot consider alternatives, it may be prevented from maximizing the price paid for the company. In certain circumstances--for example, where the no-shop provision acts to "end an active auction and foreclose further bidding" [FN11]--there is little doubt that a target board would violate its fiduciary responsibilities by agreeing to a no-shop without some sort of escape hatch.

On the other hand, a strong no-shop provision and a weak fiduciary out may be the necessary encouragement for the acquiror to enter into the agreement in the first place. Or, the target board may determine that limiting competing bids will induce the acquiror to offer its best price up front. In both cases, the no-shop provision may actually assist the target board in obtaining the best price reasonably available for the stockholders. A number of courts have acknowledged that the validity and enforceability [FN12] of no-shop provisions "turn on whether they assist the board in its obligation to seek the best value reasonably available for the stockholders." [FN13] Under this test, even an exclusive merger agreement (i.e., an agreement with a no-shop but no fiduciary out) may be valid if it helps maximize sale value to stockholders.

When a board's Revlon duties are triggered and there is more than one bidder, courts are apt to apply "enhanced scrutiny"--which involves review by the court of both "the adequacy of [the board's] decision-making process" and "the reasonableness of the [board's] action" [FN14]--when analyzing a board's decision to enter into a no-shop provision. [FN15] Thus, courts will be more receptive to no-shop clauses where the board has gathered enough information to make an informed decision. "Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids." [FN16]

There are two points in time when a board's actions are likely to be judged in a merger transaction. First, when the target enters into an agreement that contains a no-shop provision, courts may ask if the board had sufficient information to determine whether the provision did more to enhance stockholder value (by encouraging its partner) than it did to discourage third parties. While a broad market check provides the best information, courts do not always require one. [FN17] Moreover, the more freedom a target has to act on new information after signing a merger agreement, the less hostile a court is likely to be to a no-shop provision.

The second time a board's actions may be judged is after signing, when a third party makes a competing bid. If a no-shop provision prevents a target board from even considering the proposal, a court may inquire whether the board has breached its duty of care by reaching an important business decision-- effectively rejecting an offer--before fully informing itself of the relevant facts. Although courts seem to acknowledge that no-shop provisions can, in appropriate circumstances, accord with the board's Revlon duties, it is not difficult to imagine a

court holding that a target board breached its fiduciary duties by rejecting an offer, even though the cause of the rejection--the no- shop clause--was instrumental in the first instance in bringing in a committed partner.

No-Shop Provisions

Set out in the box on page 6 is a typical "no-shop" provision with "fiduciary out" language included in sections (a) and (b). The provision is intertwined with the parties' rights to terminate the agreement and the target's obligation to pay a termination fee. The standard no-shop provision is comprised of four parts. Section (a) contains limitations on (1) soliciting competing bids, (2) furnishing information and (3) negotiating with third parties, while section (b) limits the target's right to change its mind. Escape hatches are common in both section (a) (although not with respect to the (a)(i) provision against soliciting competing bids) and section (b), to reflect the target board's Revlon duties as well as its information gathering obligations. Sections (c) and (d) provide for a securities law carve-out and notice procedures.

The **"no solicitation"** and "no **negotiation"** aspects of section (a) prohibit the target from seeking alternate proposals to acquire the target (Acquisition Proposals) or even responding to unsolicited bids that do not meet certain criteria. Target's counsel may sometimes object that the terms "encourage" and "discussion" are too broad and would catch inadvertent discussions (e.g., answering the phone and finding a bidder on the other end of the line) or other contacts intended only to obtain enough information about a third party proposal to enable ***4** the board to determine whether to exercise its fiduciary out. While the acquiror might be persuaded to delete "discussions" (discussions that are "encouraging" would be picked up under clause (i) in any event), the term "encouragement" taken in context should be read to mean active, knowing assistance or encouragement. Moreover, acquiror's counsel is also likely to argue that since the merger agreement will be a public document, any third party bidder will know the restrictions that the target board is under and can tailor its competing offer, should it decide to make one, accordingly. Therefore, the acquiror might contend that certain minimum conditions on the board's ability to inform itself are appropriate, namely, the competing offer should be in writing and should provide sufficient information on its face to permit the target board to make a good faith determination whether its fiduciary out has been triggered.

An acquiror will want as many representatives of the target as possible to be subject to these provisions (although the target may agree only to use its best efforts to bring about this result). Moreover, from the acquiror's perspective, the final sentence of section (a) is particularly important, because it may insure that members of the target's management, acting as "individuals" rather than "representatives" of the company, do not solicit alternative transactions. This was the case in STV Engineers v. Greiner Engineering, [FN18] where a no-shop provision was held not to have been violated despite the large and active role of senior management--acting as "individuals"--in a management buyout attempt.

The no-shop provision is only restrictive with respect to an Acquisition Proposal, which is typically defined as a proposal or offer for some percentage (usually 5-20 percent) of the target, gauged to permit the target to solicit and consider small asset sales which do not threaten the overall transaction (in any event, the "conduct of business" covenant usually prohibits asset sales out of the ordinary course without the acquiror's written consent). While the definition usually contemplates sales of equity as well as assets, it is hard to justify allowing any equity sales; the percentage relating to equity sales should at least be low enough to insure that the purchaser cannot interfere with the transaction.

Section (b) prohibits the target board from withdrawing or modifying its recommendation of the proposed merger in a manner adverse to the acquiror, approving or recommending an alternate Acquisition Proposal or entering into an agreement with respect to an alternate Acquisition Proposal, subject in each case to the fiduciary out discussed below. These covenants extend the target board's no-shop obligations beyond refraining from active solicitation or negotiation to affirmatively agreeing not to change its position in the face of an unsolicited proposal from a third party.

In section (c), the target gives itself a necessary escape hatch: it must be able to take a position as required by Rule 14e-2(a) under the Securities Exchange Act of 1934 in the event a third party launches a tender offer. The proviso makes clear that it may not take a position pursuant to Rule 14e- 2(a)(1) (i.e., an approving position) unless it is permitted to do so under the no-shop provision. A cautious target may request a sentence making explicit that taking a neutral position pursuant to Rule 14(e)-2(a)(2) or (3) would not constitute the withdrawal by the target of its recommendation of the acquiror's transaction.

The seemingly innocuous section (d) can actually become quite important, particularly where the transaction is structured as a tender offer followed by a merger. Post-signing third party bids are likely to be made close *5 to the expiration date of the tender offer, due to time constraints, and also because the third party may try to pressure the target by giving it minimal time to decide (once the tender offer is consummated the acquiror usually owns enough shares to control the target). The acquiror is often given several days to match the third party bid before the target may accept it. [FN19] Even if no explicit matching period is provided, prompt notice of third party interest, as well as the details of any interest or proposal and the status of ongoing discussions between the target and third party, are crucial--both for the acquiror to decide whether to raise the ante and for the target to keep the acquiror in the hunt.

The Fiduciary Out

In its simplest form, a fiduciary out provision simply provides that the covenants of the target in sections (a) and (b) are "subject to the fiduciary duties" of the target board. In practice, however, as more change in control fiduciary duty cases have been decided, acquirors have attempted to circumscribe the target board's exercise of its fiduciary duties by expressly identifying in the no-shop covenant certain circumstances that will trigger the fiduciary out. While the precise fiduciary out language will depend on all the circumstances discussed above, customary triggers include a requirement that the third party proposal be in writing, that it be related to a specified percentage of the target's stock or assets and that it be reasonably likely to lead to a proposal that is more favorable to the target's stockholders than the proposed merger with the acquiror. Acquirors will also seek to have the fiduciary out become inapplicable after stockholder approval of the transaction. Targets should be wary of such cut-offs, however, particularly when the closing may occur substantially after the stockholder vote, because stockholder ratification may not protect directors who ignore subsequent third party proposals. Section 251(d) of the DGCL [FN20], for instance, contemplates that directors may terminate a merger agreement after stockholder approval, suggesting that directors' fiduciary duties do not disappear after stockholder ratification. [FN21]

The two most common fiduciary out formulations permit the target board to take actions in response to an Acquisition Proposal: (1) because it is necessary to take them to comply with the board's fiduciary duties, or (2) because failure to take them would be reasonably likely to constitute a breach of fiduciary duty. Although the two formulations would appear to be opposite sides of the same coin (if an action is necessary to comply, failure to take that action should constitute a breach), the "reasonably likely" standard of the second formulation arguably gives the target board a little more room to maneuver. Whichever formulation is chosen, it is the target board, acting in good faith with input from outside legal counsel, that makes the final determination whether to exercise its fiduciary out. While many first drafts of merger agreements from acquirors require a written opinion or written advice from counsel, it is unrealistic to expect a law firm to provide such a document. As noted above, the Delaware case law in this area provides guidelines--not black letter rules--the application of which depends heavily on the facts of a particular case. What then should be expected from target's counsel? The case law does not require the board to obtain the written opinion or advice of outside counsel. In this context, the issue will be how far the acquiror can push the target into accepting objective triggers for the board's exercise of its fiduciary duty. Mere "consultation" with outside counsel, if that is understood to mean simply a discussion of abstract legal duties, may not be a strict enough standard for an acquiror to accept. A requirement that the board's decision be based on advice of outside counsel (written or oral), creates a tougher standard because "advice" suggests that the lawyers were apprised of all the circumstances and gave direction to the board.

The fiduciary out exception to the covenant in section (a) customarily allows the target only to provide

information or to obtain information (through negotiation); it does not permit the target to solicit or otherwise facilitate a competing bid. The exception in this context typically requires that the board determine that the competing offer is reasonably likely to be a Superior Proposal. By contrast, the fiduciary out exception to the covenant in section (b) may be invoked only if the competing offer constitutes a Superior Proposal. The somewhat looser formulation for section (a) arises from the board's duty to act in an informed manner: some minimum exchange of information with a competing bidder may be required in order to permit the board to make an informed decision as to whether the alternate proposal is, in fact, superior to the transaction with the acquiror. Typically, a "Superior Proposal" will be defined as an Acquisition Proposal that (1) the board, in good faith, based on advice of outside legal counsel and of an investment banker, determines to be more favorable than *6 the acquiror's offer, and (2) is already financed or is readily financeable. The agreement will sometimes limit a Superior Proposal to proposals to acquire 50 percent or even 100 percent of the target.

As with the other triggers discussed above, the Superior Proposal condition provides the acquiror with greater objectivity and specificity than the somewhat vague fiduciary duty language. From the target's perspective, although the provision seems to limit the board's ability to exercise its fiduciary duties, the condition is likely to be an acceptable concession, because the board's duty in the Revlon context is to maximize the value reasonably available to stockholders, provided the price is offered by a reputable and responsible bidder. That the terms of a Superior Proposal must be more favorable tracks the case law requirement to maximize value, while the ability to finance condition goes to the responsibleness of the bidder. Other constraints, however, such as limiting Superior Proposals to proposals for a set percentage of the target, may indeed go beyond fiduciary principles.

Sample No-Shop Provision

(Provided by Paul S. Bird and Andrew L. Bab)

No Solicitation. (a) The Company shall not, and shall not authorize or permit any of its officers, directors or employees or any investment banker, financial advisor, attorney, accountant or other representative retained by it to, directly or indirectly, (i) solicit, initiate or encourage (including by way of furnishing non-public information), or take any other action to facilitate, any inquiries or the making of any proposal that constitutes, or may reasonably be expected to lead to, an Acquisition Proposal or (ii) participate in any discussions or negotiations regarding an Acquisition Proposal; provided, however, that if, at any time prior to the adoption of this Agreement by the holders of common stock, the Board of Directors of the Company determines in good faith, based on the advice of outside counsel, that failure to do so would be reasonably likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable law, the Company, in response to a written Acquisition Proposal that (I) was unsolicited or that did not otherwise result from a breach of this Section, and (II) is reasonably likely to lead to a Superior Proposal, may (x) furnish non-public information with respect to the Company to the person who made such Acquisition Proposal pursuant to a customary confidentiality agreement and (y) participate in negotiations regarding such Acquisition Proposal. Without limiting the foregoing, it is understood that any violation of the restrictions set forth in the preceding sentence by any director or officer of the Company or any of its subsidiaries or any investment banker, financial advisor, attorney, accountant or other representative of the Company or any of its subsidiaries, whether or not acting on behalf of the Company or any of its subsidiaries, shall be deemed to be a breach of this Section by the Company.

(b) The Board of Directors of the Company shall not (1) withdraw or modify, or propose to withdraw or modify, in a manner adverse to the Purchaser, its approval or recommendation of this Agreement or the Merger unless there is a Superior Proposal outstanding, (2) approve or recommend, or propose to approve or recommend, an Acquisition Proposal that is not a Superior Proposal or (3) cause the Company to enter into any letter of intent, agreement in principle, acquisition agreement or other agreement with respect to an Acquisition Proposal that is not a Superior Proposal unless the Board of Directors of the Company shall have (x) determined in good faith, based on the advice of outside counsel, that failure to do so would be reasonably likely to constitute a breach of its fiduciary duties to the Company's stockholders under applicable law, and (y) terminated this Agreement pursuant to the termination provisions.

(c) Nothing contained in this Section shall prohibit the Company from at any time taking and disclosing to its stockholders a position contemplated by Rule 14e-2(a) promulgated under the Securities Exchange Act of 1934, as amended, provided, however, that neither the Company nor its Board of Directors shall, except as permitted by paragraph (b) of this section, propose to approve or recommend, an Acquisition Proposal.

(d) The Company shall promptly (but in any event within one day) advise the Purchaser orally and in writing of any Acquisition Proposal or any inquiry regarding the making of an Acquisition Proposal including any request for information, the material terms and conditions of such request, Acquisition Proposal or inquiry and the identity of the person making such request, Acquisition Proposal or inquiry. The Company will, to the extent reasonably practicable, keep the Purchaser fully informed of the status and details (including amendments or proposed amendments) of any such request, Acquisition Proposal or inquiry.

*7 It has been argued that in most circumstances the clearer, more specific "Superior Proposal" formulation should be used in lieu of the fiduciary duty language. [FN22] However, acquirors may want both standards on the theory that a Superior Proposal is a necessary but not sufficient trigger for the fiduciary out; that is, where a target board must consider the risk of losing a sure acquisition partner, it may determine that its fiduciary duties do not permit or require it to consider some Superior Proposals (e.g., those only marginally superior or those made by "disreputable" bidders who may be unable to consummate a transaction). Moreover, fiduciary law may change during the pendency of a transaction. The flexibility of the fiduciary duty formulation better reflects the complexity and variability of this area of the law.

The fiduciary out language in section (b) allows the target board to change its mind. In the context of the exercise by the target board of its fiduciary duties, the target may withdraw or modify its recommendation of the transaction, recommend an alternative Acquisition Proposal or, in most cases, actually enter into an acquisition agreement with a third party. If the parties decide to include a Superior Proposal requirement in section (a), there is even more reason to use one here, where the focus is more on Revlon duties than on information gathering. Thus, the target would be limited in section (b) to recommending only a Superior Proposal, entering into an acquisition agreement only with respect to a Superior Proposal or withdrawing or modifying its recommendation only in the face of a Superior Proposal. The third of this fiduciary triad is a little different than the others, because a board may seek to withdraw its recommendation for reasons quite apart from a competing bid: the so-called "discovered gold" scenario. The question becomes whether a company that is in "Revlon mode" may unilaterally, consistent with its board's fiduciary duties, decide not to sell itself because of some unforeseen development. While case law suggests that a company may fall out of "Revlon mode" in some situations, [FN23] it is not clear that withdrawing a recommendation based on changed circumstances where there is no higher price available would ever be consistent with Revlon or a course of action dictated by a board's fiduciary duties.

Termination Provisions and Fees

The interplay among the no-shop, termination, and termination fee provisions is complex, and termination triggers vary considerably from agreement to agreement. Often the target will be required to terminate the contract before entering into a competing acquisition agreement, and some contracts even require termination prior to the target board's withdrawal of a recommendation or approval of another transaction. This termination requirement has three goals. First, it may give the acquiror some comfort that it is not going to be used as a stalking horse and forces the target to balance its duties: on the one hand to lose a sure thing, on the other to encourage a Superior Proposal. (Of course, if the target is entering into another agreement, the balancing act becomes much simpler.) A second goal is to allow time for the acquiror to match the Superior Proposal: the target often may not terminate under section (b) for some number of days (typically, five) after notifying the acquiror of its intent to do so. If the acquiror does amend its bid during the matching period, the target will have to measure the new bid against the third party bid to decide whether, in the context of its fiduciary duties, it should still accept the alternate bid and terminate or keep with its original partner. The provision does not usually contemplate the possibility of a protracted bidding contest, because it is not in either party's interest to suggest in the contract that there was that much money left on the table. Finally, forcing the target to terminate before acting on a Superior Proposal often

helps the acquiror to guarantee that it will be paid its termination fee, because the termination provisions often condition the effectiveness of such termination on the prior or concurrent payment of the fee.

If the fiduciary out provisions do not require the target to terminate the agreement prior to or concurrently with withdrawing its recommendation or recommending another transaction, the acquiror will often have the immediate right to terminate. Sometimes the target will have the right, but not the obligation, to terminate in such circumstances. From the acquiror's standpoint, however, it makes little sense to allow, but not require, the target to terminate, because in either case the acquiror loses its opportunity to buy the target, but in the latter case it can increase its chances of being paid its fee, as discussed below.

In some cases, the acquiror will seek the right to terminate if the target exercises its fiduciary out in order to participate in discussions with or provide information to a third party. Such a provision is difficult to justify, particularly where there has been no pre-signing market check. Without some exchange of information, many third parties would be hard-pressed to make *8 a meaningful bid for a company already bound by a merger agreement. Target boards would find it difficult to risk losing an existing deal to provide information to a third party that is simply testing the waters. Chilling the right to exchange information could seriously reduce the effectiveness of the fiduciary out.

Termination of the merger agreement upon the target board's exercise of its fiduciary out typically triggers the requirement to pay a termination or "break-up" fee. While termination fees in the range of 1-3 percent of the purchase price have generally been upheld by Delaware courts, [FN24] where the termination fee is used to favor one bidder over another or acts to end an active auction, courts may invalidate it. To reduce the risk that the fee will not be upheld, drafters often focus on the termination fee as compensation, rather than as a defensive mechanism (although both, in the appropriate circumstances, are valid purposes [FN25]). Thus, for instance, termination of the agreement may trigger a smaller fee but require reimbursement of the acquiror's expenses up to a certain amount. This is particularly useful to an acquiror with high expenses, such as a foreign acquiror whose financing arrangements might require payment of significant out-of-pocket fees and expenses even if the transaction is never consummated.

Triggering payment of the termination fee off the consummation of an alternative transaction can be helpful from the target's perspective, because stockholders, who will be receiving consideration for their shares, may be less likely to object to a large payment that effectively is borne by an alternate acquiror. As typically drafted, the acquiror becomes entitled to an inchoate right to the fee upon termination of the agreement. Unless within some period (typically one year) following the termination an alternative transaction is consummated or (in order to prevent the target from reaching an agreement within a year but closing thereafter) the target enters into an agreement with respect to an alternative transaction, the right to receive the fee expires. If the fee is triggered, however, it typically does not actually get paid until consummation of the alternative transaction. The acquiror can mitigate the effect of this by negotiating for a two-tiered fee, whereby some portion of the fee becomes payable immediately upon termination while the rest is not due until consummation of another transaction. [FN26]

There are three categories of termination rights that might trigger a termination fee. First, there are termination rights unrelated to Revlon concerns: an acquiror with high costs may negotiate for a fee in the event the agreement is terminated, for instance, due to a material adverse change in the target. Such a fee would cover the acquiror's costs but has no deterrent effect on competing bidders.

Next, there are termination rights associated with the exercise of the target's fiduciary out. If a target exercises its fiduciary out in order to enter into an agreement with a third party, a termination fee would normally immediately become due. If the target withdrew its recommendation or recommended an alternative transaction, a termination fee would generally become payable if another transaction were consummated within the one-year period discussed above. Often the parties will negotiate over whether the transaction ultimately consummated must be linked to the proposal (and the competing bidder) that led the target to change its recommendation. Requiring the transaction to be the "same" as the original proposal would be too restrictive, because subsequent negotiations may result in a restructured proposal or a new party may top the third party's proposal. Yet, if the triggering

transaction is wholly unrelated to the original proposal, the target may be required to pay a fee even if the alternative transaction collapsed but a new transaction with an entirely new partner was consummated ten months later. While it may be possible to craft language that links the two triggers appropriately, the parties generally agree to use the time period within which a transaction must be consummated as a proxy for the relatedness of the triggers: the shorter the period, the more likely the two are to be linked.

The final category of termination triggers are those that do not arise as a result of a fiduciary out, but are nevertheless related to Acquisition Proposals. For instance, a target usually may terminate the agreement if the target's stockholders fail to approve it or if the transaction fails to close by some "drop dead" date. Both of these events are to some extent under the control of the target or its stockholders; in order to prevent the target *9 from unfairly circumventing the termination fee provisions, the acquiror may demand a fee if the agreement is terminated under these circumstances and an Acquisition Proposal was outstanding at the time of the termination. [FN27] In this case, the target should insist that the fee be payable only upon consummation of the Acquisition Proposal within some time period. Moreover, an "Acquisition Proposal" may be too low a threshold; the target may want the fee to be payable only if a Superior Proposal is consummated.

The question often arises as to whether the termination fee should be characterized as a form of liquidated damages. Many targets believe that they can limit their exposure by characterizing the fee in this manner. While the acquiror might resist this characterization, the court in Brazen enforced a large termination fee on the basis of its being liquidated damages. The court implied, however, that had the agreement been silent on the matter, the business judgment rule would have applied. Because the discretion given the board under the business judgment rule is greater than that under a liquidated damages analysis, which requires a substantive showing of reasonableness, both parties may have an incentive not to identify the fee as liquidated damages in order to protect the enforceability of the fee. Of course, where enhanced scrutiny is applicable, it may be more difficult to sustain the validity of a termination fee that is not specified to be liquidated damages.

Non-Revlon Transactions

This article has so far focused on transactions that clearly implicate Revlon duties, such as cash tender offers followed by mergers or single-step cash mergers. However, no-shop provisions are also often contained in agreements involving transactions that do not trigger Revlon or raise other fiduciary issues. How should the no-shop clauses be modified--if at all--under these circumstances? While the scope of this article does not permit a thorough answer, a brief look at two common non-Revlon transactions may be useful.

Stock for stock mergers. Where control of a target is transferred to "a fluid aggregation of unaffiliated shareholders," [FN28] as in many stock for stock mergers, a target board does not become subject to Revlon duties. While enhanced scrutiny under Unocal and Unitrin would apply to the board's decision to enter into a no-shop in the face of a hostile third-party bid, the ordinary business judgment rule would instead apply if the agreement were entered into before any competing bids surfaced. Courts would be likely to uphold a target board's business judgment in entering into any type of no-shop clause--even one providing for exclusivity--as long as the board was not conflicted and was adequately informed.

In stock for stock deals, then, any escape hatch from a no-shop should focus primarily on information gathering. If the target does demand an escape hatch, it may in this case prefer a Superior Proposal condition to terminating the agreement or recommending another deal instead of fiduciary duty language on the theory that, in the absence of Revlon duties, it is unlikely that a fiduciary duty condition--no matter how it is formulated--would ever be met.

Controlling stockholders. In a "going private" transaction involving a majority stockholder, [FN29] control already resides in the hands of the stockholder, and the purchase of the minority shares is unlikely to trigger Revlon duties. [FN30] However, controlling stockholders owe heightened duties to the minority, and a going private corporate transaction will be subject to an "entire fairness" analysis, [FN31] comprising both a procedural and a

substantive component. To help insure that the transaction is deemed to be procedurally fair, it may be useful to include a fiduciary out, even though Revlon duties would not apply. Moreover, in these types of transactions, decisions are customarily delegated to a committee of independent directors to bolster the procedural fairness argument. Fiduciary out provisions should therefore key off of the independent committee's determination, not the full board's.

Although Revlon does not apply in this context, the target board still owes a fiduciary duty to the minority, and the courts have identified that duty as one of "immediate value maximization." [FN32] In substance, it is hard to distinguish this duty from a traditional Revlon duty (except that the duty is to get the best price available for a non-controlling ownership interest), and many of the arguments raised in this article will be equally applicable in this context. Because the target board has the additional complication of owing fiduciary duties to the acquiror as a controlling stockholder, the flexibility of the fiduciary language strongly argues for its use. The controlling stockholder may not object to fiduciary language since the possibility of a successful competing bid is very small. [FN33] It is worth noting as a final point that a target board may still be subject to Revlon if the controlling stockholder dominates the target but owns less than a controlling equity position. Depending on the circumstances, all of the "controlling stockholder" duties ***10** could apply as well as Revlon, making the fiduciary out particularly important.

Conclusion

The complexity of fiduciary duty law in the context of a change in corporate control and the almost endless variety of circumstances that influence such transactions make the **negotiation** of **no-shop** and related provisions multi- faceted and challenging. This article has set forth some of the most important issues that might arise in the course of negotiations. Each set of contract provisions, however, must be carefully tailored to reflect the relationship between the parties, the history of the relationship, and the potential for competing suitors. Lawyers negotiating the provisions must be particularly attuned to these circumstances and to their clients' special concerns.

[FNa1]. Paul S. Bird is a partner, and Andrew L. Bab is an associate, at Debevoise & Plimpton in New York, N.Y.

[FN1]. In this article the terms "no-shop" and "fiduciary out" include the "no-negotiation" clause and the various other related clauses that are set forth in the box on page 6.

[FN2]. See Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 48 (Del. 1994), Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1985), and Mills Acquisition Co. v. MacMillan, 559 A.2d 1261 (Del. 1989).

[FN3]. Unless stated otherwise, this article is based on Delaware law. While many states follow Delaware's lead, variations in the governing jurisdiction's fiduciary principles (whether by statute or by case law) may suggest modifications to the provisions discussed in this article.

[FN4]. See, e.g., Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987).

[FN5]. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

[FN6]. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).

[FN7]. Id. at 182.

[FN8]. QVC, 637 A.2d at 43 (italics added).

[FN9]. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 (Del. 1989) (italics added).

[FN10]. Arnold v. Society for Savings Bancorp., Inc., 650 A.2d 1270, 1290 (Del. 1994) (citations omitted).

[FN11]. Revlon, 506 A.2d at 183.

[FN12]. Case law is mixed as to the effect of no-shop provisions that "contract away [a board's] fiduciary obligations." QVC, 637 A.2d at 51. While the QVC court found such a provision unenforceable, a number of cases indicate that a board's fiduciary duties do not give it the right to abrogate an executed merger agreement. See, e.g., Smith v. Van Gorkom, 488 A.2d 858, 898 (Del. 1985); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 76B (Tex. Ct. App. 1987), cert. dismissed, 485 U.S. 994 (1988). It is possible that courts will entertain third party claims of unenforceability while at the same time prohibiting target boards from invoking their fiduciary duties to violate an executed merger agreement.

[FN13]. Rand v. Western Air Lines, C.A. No. 8632, 1994 Del. Ch. LEXIS 26, at *19 (February 25, 1994), (citiation omitted), aff'd, 659 A.2d 228 (Del. 1995).

[FN14]. QVC, 637 A.2d at 45.

[FN15]. See. e.g., Mills, 559 A.2d at 1288.

[FN16]. Barkan v. Amsted Industries Inc., 567 A.2d 1279, 1288 (Del. 1989). See also, QVC, 637 A.2d at 37 (target board must "act on an informed basis to secure the best value reasonably available to the stockholders"); Rand, 1994 Del. Ch. LEXIS at *10 ("Although the Court must apply 'enhanced scrutiny,' the essential question remains whether a disinterested board has satisfied its duty to act on a fully informed basis.").

[FN17]. See e.g., Barkan, 567 A.2d at 1288.

[FN18]. STV Engineers, Inc. v. Greiner Engineers, Inc., 861 F.2d 784 (3rd Cir. 1988).

[FN19]. Both parties may want to provide for the extension of the tender offer in the event the matching period extends beyond the expiration date.

[FN20]. 8 Del. § 251(d) (1997).

[FN21]. But see In re Mobile Communications Corp. of America, Civ. Nos. 10627, 10638, 10644, 10656, and 10697, 1991 Del. Ch. LEXIS (January 7, 1991) (holding that a termination right based on a change of recommendation expires once stockholder approval is obtained).

[FN22]. See Johnston and Alexander, Fiduciary Outs and Exclusive Merger Agreement--Delaware Law and Practice, INSIGHTS, Feb. 1997, p. 15.

[FN23]. .See, e.g., In re Santa Fe Pacific Corp. Shareholder Litigation, 669 A.2d 59 (Del. 1995).

[FN24]. Higher percentages are not unheard of in smaller transactions where the absolute amount of the fee may not be high. Cases in Delaware upholding termination fees of 2-3 percent include Brazen v. Bell Atlantic Corp., 695 A.2d 43 (Del. 1997) (2 percent); Kysor Indus. Corp. v. Margaux, 674 A.2d 889 (Del. Sup. 1996) (2.8 percent); Roberts v. General Instrument, 1990 WL 118356 (Del. Ch. 1990) (2 percent); Lewis v. Leaseway Transportation, 1990 WL 67383 (Del. Ch. 1990) (3 percent); and Braunschweiger v. American Home Shield Corp., 1989 WL 128571 (Del. Ch. 1989) (2.3 percent).

[FN25]. See e.g., Yanow v. Scientific Leasing, Civ. Nos. 9536 & 9561, 1988 Del. Ch. LEXIS 26 (February 5, 1988).

[FN26]. This was the case in the NYNEX/Bell Atlantic merger, the subject of Brazen v. Bell Atlantic Corp., 695 A.2d 43 (Del. 1997).

[FN27]. Although a fee payable upon stockholders' rejection of the deal may seem to be coercive, the Delaware Supreme Court approved such a fee in Brazen, 695 A.2d at 45.

[FN28]. Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989).

[FN29]. Or a supermajority stockholder, if applicable law or charter provisions require a supermajority vote in some circumstances.

[FN30]. See, e.g., Mendel v. Carroll, 651 A.2d 297 (Del. Ch. 1994).

[FN31]. See, e.g., Kahn v. Lynch Communication Systems, Inc., 669 A.2d 79, 82 (Del. 1995).

[FN32]. Mendel, 651 A.2d at 306.

[FN33]. But see Mendel, 651 A. 2d 297, where a competing bidder sought an option which would have diluted the controlling stockholder's control position.

END OF DOCUMENT

Business Contracts

AGREEMENT OF STRATEGIC RELATIONSHIP

[Information below, marked with [**], has been omitted pursuant to a re
for confidential treatment. A complete copy of this document has been s
to the Securities and Exchange Commission under separate cover.]

This AGREEMENT OF STRATEGIC RELATIONSHIP (the "agreement") is made and
into as of October 14, 1997, between Lucasfilm Ltd., a California corpo
("Lucasfilm"), on the one hand, located at P. O. Box 2009, San Rafael,
and Hasbro, Inc., a Rhode Island corporation, located at 1027 Newport A
Pawtucket, RI 02862 ("Hasbro"), on the other hand.

WHEREAS:

A. Lucasfilm is a California corporation engaged in the productio
theatrical motion pictures and the licensing of intellectual property r
related to such theatrical motion pictures;

B. Lucasfilm owns or controls rights in respect of the Property (
hereinafter defined);

C. Hasbro is engaged in the manufacture, distribution and sale of
products in the form of toys including, without limitation, toys based
entertainment intellectual properties licensed from third parties;

D. Lucasfilm and Hasbro have a longstanding relationship with res
the licensing of such rights; and

E. Lucasfilm and Hasbro wish to establish a strategic relationshi
Hasbro would acquire the opportunity to license certain rights in and t
theatrical motion pictures produced by Lucasfilm for the manufacture,
distribution and sale of Products in the Territory, subject to the term
conditions of this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and su
of which is hereby acknowledged, the parties agree as follows:

1. GRANT OF RIGHTS.

Subject to the terms and conditions of this agreement, and in
consideration for all of Hasbro's obligations hereunder, includin
without limitation, Hasbro's agreement to grant to Lucasfilm a wa
provided in Paragraph 4 hereinbelow, Lucasfilm grants to Hasbro a
exclusive, non-transferable, non-assignable right of first negoti
(the "First Negotiation Right") and, as more specifically provide
Subparagraph 3.3 hereinbelow, right of first refusal (the "First
Right") during the Term and throughout the Territory to license t
Property as provided in Paragraph 3 hereinbelow:

1.1. to develop, design, manufacture, distribute, advertise, publ
market and sell the Products, for sale to retail Customers throug
channels of wholesale and retail distribution permitted hereunder

1.2. for reproduction on containers, packaging, display and promo material and in Advertising and Advertising Materials for the Pro

The First Negotiation Right and First Refusal Right shall be exer Hasbro in accordance with the terms and conditions contained in t agreement.

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Agreement Between Lucasfilm Ltd. and Hasbro, Inc. dated October 14, 199

2. TERM AND TERRITORY.

2.1. Term. The term of Hasbro's rights pursuant to this agreement respect to the First Negotiation Right and First Refusal Right (t "Term") shall consist of the time period commencing as of the dat and ending on December 31, 2007.

2.2. Territory. The territory of Hasbro's rights hereunder (the "Territory") consists of the world excluding China.

3. EXERCISE OF FIRST NEGOTIATION RIGHT AND FIRST REFUSAL RIGHT.

The First Negotiation Right and in certain situations First Refus as to each theatrical motion picture which is an element of the P shall be exercisable by Hasbro in accordance with the following p

3.1. If Lucasfilm desires to license the rights referenced in Subparagraphs 1.1 and 1.2 hereinabove with respect to any theatri motion picture which is an element of the Property, then Lucasfil notify Hasbro in writing. Lucasfilm shall concurrently make avail Hasbro at Lucasfilm's premises all materials then extant regardin motion picture, including script, artwork, casting, to the extent available.

3.2. Hasbro shall thereafter have thirty (30) days from the date notice (the "First Negotiation Period") to negotiate and enter in written agreement (the "Agreement"), which agreement shall incorp less than all of the terms and conditions of that certain license agreement between Hasbro and Lucas Licensing Ltd. dated as of Oct 1997 (the "Toy Agreement") with the exception of Royalties (Parag Advance (Paragraph 7), Term (Paragraph 2), [**] (Subparagraph 4.3 Minimum Sales Levels (Subparagraph 4.2), and the definition of Li Property (Subparagraph 24.68) (collectively the "Excluded Terms") provided, however, that neither party shall be obligated to concl Agreement with respect to a particular theatrical motion picture an element of the Property. During the First Negotiation Period, parties shall negotiate with respect to the Excluded Terms, provi the Royalty Percentage shall be no less than ten percent (10%) of Sales and no more than the rates specified in Paragraph 8 of the Agreement.

3.3. If the parties fail to enter into an Agreement with respect theatrical motion picture during the First Negotiation Period, th Lucasfilm shall be free to negotiate with and conclude an agreeme any third party with respect to the rights that are incorporated First Negotiation Right provided, that with respect to those thea motion pictures set forth in Subparagraphs 5.2(a)(i), (ii), (iii) (iv) ("First Refusal Pictures"), Lucasfilm shall not conclude an with a third party with respect to such rights on terms that are favorable to Lucasfilm than those terms last offered by Hasbro wi

giving notice of such third party offer to Hasbro and providing H
with a ten (10) day period (the "First Refusal Period") within wh
enter into an Agreement with Lucasfilm on the same terms and cond
contained in the third party offer (the "First Refusal Right"). I
fails to execute such Agreement within such

First Refusal Period with respect to a First Refusal Picture or w
First Negotiation Period with respect to all other theatrical mot
pictures included within the Property, then Lucasfilm shall be fr
enter into an agreement with such third party with respect to a F
Refusal Picture or with any third party with respect to all other
theatrical motion pictures subject to the First Negotiation Right
theatrical motion picture shall be deleted from the definition of
Property hereunder.

3.4. Lucasfilm makes no representation or warranty that any right
otherwise would be subject to the First Negotiation Right and Fir
Refusal Right as to any theatrical motion picture produced by Luc
following the date hereof and during the Term will be owned or co
by Lucasfilm or that Lucasfilm will retain the right or ability t
such theatrical motion picture as an element of the Property,
notwithstanding the fact that at any point in time, Lucasfilm may
owned or controlled such rights. In this connection, Hasbro ackno
that Lucasfilm may enter into an arrangement with respect to a pa
theatrical motion picture (other than a grant of a license for th
Products alone for such theatrical motion picture) in which the g
such rights to a third party may be necessary in Lucasfilm's sole
in order to finance, produce, distribute or exploit such theatric
picture or any underlying rights relating to such theatrical moti
picture.

4. WARRANT.

Concurrently with the execution of this Agreement, Hasbro shall g
Lucasfilm a warrant (the "Warrant") for the purchase of up to 2,6
fully paid and non-assessable shares of the common stock of Hasbr
following exercise of the Warrant at a per share exercise price e
$28.00, subject to adjustment as provided in the warrant dated as
date hereof between Lucasfilm and Hasbro (the "Warrant").

5. DEFINITIONS.

5.1. "Products" means those products, goods and articles, within
enumerated categories in Schedule II of the Toy Agreement and whi
based on or incorporating elements of the Property.

5.2. "Property" means, subject to the terms, conditions and restr
contained in Lucasfilm's or any Lucasfilm Related Entity's agreem
persons, firms or entities rendering services or granting rights:

(a) the original titles, designs, character names and liken
dialogue, music and sound effects, words, symbols, logograp
the footage, photographs, artwork, visual representations o
props, costumes, sets, special effects and any other origin
creative elements which appear in, have become directly ass
with, and as are depicted in, any theatrical motion picture
by Lucasfilm prior to or during the Term, as to which Lucas
and controls the rights hereunder, subject to Section 3.4,

including, but not limited to:

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(i) any theatrical motion picture based on or related character "Indiana Jones," including without limitati Raiders of the Lost Ark, Indiana Jones and the Temple Indiana Jones and the Last Crusade, and any prequel o theatrical motion picture based on the "Indiana Jones character including the sequel theatrical motion pict currently in development and tentatively entitled "In Jones IV" and intended to star Harrison Ford and be d by Steven Spielberg;

(ii) the theatrical motion picture entitled "Willow" sequels, prequels or remakes thereof, including, with limitation, those based upon the "Shadow Wars" book s written by George Lucas and Chris Claremont;

(iii) any theatrical motion picture based upon the bo entitled "Lucasfilm's Alien Chronicles" published by Books;

(iv) the theatrical motion pictures entitled "Tucker: and His Dream" and any sequels, prequels or remakes t and

(b) such original trademarks, tradenames, servicemarks and servicenames owned by Lucasfilm and arising out of and whic directly associated with any theatrical motion picture whic element of the Property, to the extent of Lucasfilm's right applicable country of the Territory under such country's ap trademark laws.

Notwithstanding anything set forth above, Property shall not incl theatrical motion picture based on or related to "Star Wars", inc without limitation:

(A) those certain previously released theatrica pictures (and the special editions thereof rele theatrically in 1997) entitled "STAR WARS: EPIS A NEW HOPE," "STAR WARS: EPISODE V - THE EMPIRE BACK" and "STAR WARS: EPISODE VI - RETURN OF TH (the "Classic Trilogy"); and

(B) each of the first three succeeding prequel theatrical motion pictures to the Classic Trilo tentatively entitled "Episode I," "Episode II" "Episode III," respectively (each such prequel theatrical motion picture a "Prequel" herein).

In connection with such exclusion, the parties acknowledge that H entered into the Toy Agreement with Lucas Licensing Ltd., the own applicable rights related to Star Wars.

6. GENERAL.

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Agreement Between Lucasfilm Ltd. and Hasbro, Inc. dated October 14, 199

6.1. Assignment. Subject to the other terms and conditions of thi Subparagraph 6.1, this agreement will bind and inure to the benef each party and to their respective successors and assigns. Hasbro not voluntarily or by operation of law assign, sub-license, trans encumber or otherwise dispose of all or part of any right or priv licensed to Hasbro in this agreement, including to a Hasbro Affil without Lucasfilm's prior written approval to be given or withhel Lucasfilm's absolute discretion. For purposes of this Subparagrap any Change in Control of Hasbro (as defined in the Warrant), shal deemed a purported assignment subject to Lucasfilm's prior writte approval. Any attempted assignment, sublicense, transfer, encumbr other disposal without such approval will be null and void and co a material default and material breach of this agreement.

6.2. Governing Law. This agreement will be governed by and constr accordance with the laws of the federal laws of the United States laws of the State of California applicable to agreements entered to be performed entirely, within California between California re (and excluding the United Nations Convention on Contracts for the International Sale of Goods) without regard to choice of law prov and regardless of the place or places of its actual execution or performance. Any suit, action or proceeding between or among any parties hereto arising out of or related to this agreement will b solely in the federal or state courts in the Northern District of California, and Hasbro hereby submits to the personal jurisdictio and agrees to such courts as the appropriate venue. Notwithstandi foregoing, Hasbro agrees that, for purposes of collecting monies pursuant to this agreement, Hasbro, at Lucasfilm's election, may subject to whatever local laws and courts have jurisdiction in an of the Territory over Hasbro. Process in any action or proceeding referenced to in this Subparagraph 6.2 may be served on Hasbro at address for notices set forth in Subparagraph 6.4 hereinbelow.

6.3. Attorneys' Fees. In the event of any legal proceeding betwee parties arising out of or related to this agreement, the prevaili shall be entitled to recover, in addition to any other relief awa granted, its costs and expenses (whether or not in connection wit litigation and including, without limitation, attorneys' fees and incurred in connection with any such proceeding.

6.4. Notices. Any notice to be given or served under this agreeme be in writing and shall be delivered to the parties addressed as below, or to such other address as either party shall notify the party of in writing, as follows: personally or sent by cable, tel telemessage or by facsimile, telex, telecopy or other print out communication mechanism or by first class, prepaid, registered or certified mail (if available) post (air mail if posted to another to the party to be served at the address set forth below in this Subparagraph 6.4 or to such other address as either party may fro time notify in writing to the other. Such notice shall be deemed been served: (a) immediately in the case of personal delivery; (b case of a cable, telegram or telemessage, on the first business d the receipt by the relevant service of the order therefor; (c) in of facsimile, telex, telecopy or other print out mechanism, on th expiration of four (4) hours from the time of transmission subjec

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Agreement Between Lucasfilm Ltd. and Hasbro, Inc. dated October 14, 199

case of telex or facsimile to proof by the sender that he/she hol
acknowledgment (whether in mechanical form other otherwise) confi
receipt at its destination and subject in the case of facsimile o
print out transmission in the absence of an acknowledgment to the
notice being sent by post or by personal delivery in accordance w
Subparagraph 6.4 not later than the next business day after such
transmission; and (d) in the case of postal delivery, on the seco
business day following the date of posting (the fifth business da
posted to another country) or on acknowledgment of receipt if ear

If to Lucasfilm:

For notices to Lucasfilm: P. O. Box 2009, San Rafael, CA 9
Attention: President; with a copy to: General Counsel.

For wire transfers: pursuant to Lucasfilm's written wire
transfer instructions

For deliveries requiring Lucasfilm's street address: 5858
Valley Road, Nicasio, CA 94946

If to Hasbro:

Hasbro, Inc.
1027 Newport Avenue
Pawtucket, RI 02862
Attn: General Counsel

6.5. No Waiver. No action taken by either party pursuant to this agreement, and no waiver by either party, whether express or impl any provision or right in this agreement or any breach thereof, a failure of either party to exercise or enforce any of its rights this agreement, will constitute a continuing waiver with respect provision or right or as a breach or waiver or any other provisio right, whether or not similar.

6.6. Independent Contractors. The parties to this agreement are a remain independent contractors. There is no relationship of partn employer, employee, principal, agent, joint venture, employment, or agency between the parties. Except as expressly provided in th agreement, neither party will have the power to bind the other or obligations on the other's behalf without the other's prior writt approval and shall not represent that it has such right.

6.7. Nonexclusive Remedy. The exercise by either party of any rem this agreement will be without prejudice to its other remedies un agreement or otherwise.

6.8. Severability. This agreement is severable. If any provision agreement is found invalid or unenforceable in any jurisdiction, provision, as to that jurisdiction, will be ineffective to the ex such invalidity or unenforceability without rendering invalid or unenforceable the other remaining provisions of this agreement, w other

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remaining provisions will not be affected and shall remain in for

the maximum extent permissible.

6.9. Headings, Captions and Names. The name of this agreement, an headings and captions herein contained, are for reference and con only and do not define, limit or expand the scope or intent of an provision hereof and shall not be relied upon in or in connection construction or interpretation of this agreement. The words "here "hereunder," "hereof" and similar terms refer to this entire agre shall not be limited to the specific paragraphs or subparagraphs they are used.

6.10. Capitalized Terms. All capitalized terms contained in this shall have the same meaning as set forth in the Toy Agreement, ex otherwise expressly set forth herein.

6.11. Counterparts. This agreement may be executed in one or more counterparts, and by facsimile, telex, telecopy or other print ou communication mechanism, each copy of which shall be deemed an or and all of which, when taken together, shall constitute one and t instrument, but this agreement shall not be binding upon the part it has been signed by both parties. The parties hereto agree that facsimile signatures on a copy of this agreement shall be effecti enforceable as if they were original signatures.

6.12. Further Instruments. Except as otherwise expressly provided agreement, each party shall furnish to the other (and shall deliv cause to be executed, acknowledged and delivered to the other) an instruments, which such other party may reasonably require or dee necessary from time to time to evidence, establish, protect, enfo defend or secure to such other party any or all of its rights her to more effectuate or carry out the purposes, provisions or inten agreement.

6.13. Entire Agreement. This agreement together with the Warrant constitute the complete and entire agreement between the parties respect to the subject matter hereof, superseding and replacing a all prior agreements, negotiations, communications, and understan (both written and oral) regarding such subject matter. This agree only be modified, or any rights under it waived, by a written doc executed by both parties

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Agreement Between Lucasfilm Ltd. and Hasbro, Inc. dated October 14, 199

LUCASFILM LTD. ("Lucasfilm"), a California Corporation	HASBRO, INC. ("Hasbro"), a Rhode Island corporation
By: /s/ GORDON RADLEY	By: /s/ HAROLD P. GORDON
Title: President	Title: Vice Chairman

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STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FIRST UNION CORPORATION,
WACHOVIA CORPORATION,
and FIRST UNION NATIONAL BANK,

Plaintiffs

v.

SUNTRUST BANKS, INC.,

Defendant.

v.

FIRST UNION CORPORATION, ET AL.,

Counterclaim Defendants,

LESLIE M. BAKER, JAMES S. BALLOUN,
PETER C. BROWNING, JOHN T. CASTEEN, III,
THOMAS K. HEARN, JR., GEORGE W.
HENDERSON, III, W. HAYNE HIPP, LLOYD
U. NOLAND, III, JOHN C. WHITAKER, JR.,
and DONA DAVIS YOUNG,

Additional Counterclaim Defendants.

01-CVS-10075

STATE OF NORTH CAROLINA

FORSYTH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

IN RE WACHOVIA SHAREHOLDERS
LITIGATION

Consolidated
Civil Action No. 01-CVS-4486

termination provision under the business judgment rule.[91] However, the Delaware Supreme Court stated that the provision should have been analyzed under the "test accepted by Delaware courts for analyzing the validity of liquidated damages provisions."[92] The sole basis for the court's treatment of the provision as liquidated damages was based on the express "liquidated damages" language in the merger agreement.

{57} Two years later, the Delaware Chancery Court case, *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.,* raised the question of the appropriateness of a preliminary injunction in the context of a pending shareholder vote.[93] In *Phelps Dodge* a merger agreement between Cyprus and ASARCO contained a no-talk provision and a 6.3% termination fee.[94] The court said the "no-talk" provision "was the legal equivalent of legal blindness, a blindness that may constitute a breach of the board's duty of care; that is, the duty to be informed of all material information reasonably available."[95] Despite finding that the board likely breached its fiduciary duties and that plaintiffs would likely prevail at trial, the court refused to enjoin the merger because it could not find irreparable harm. The court stated:

> Phelps' contention that it will walk away after a merger is consummated between Cyprus and Asarco is a self-inflicted harm. This Court cannot and, in my judgment, should not save one from oneself.
>
> I also need not rescue the shareholders from losing out on a premium bid, as they can simply vote down the Cyprus/Asacro transaction which is scheduled to be voted on this Thursday. When such self-help measures are clearly available and when the arsenals of all parties have been unleashed so as to fully and completely educate the shareholders of their choices, it is not for this Court to ride to their rescue.
>
> And even if the Court were to invalidate the challenged provisions, it is not clear that such relief will benefit the shareholders voting on Thursday. Plenty of information, from all that I can tell, is already available in the marketplace.[96]

The *Phelps Dodge* opinion suggests that judicial interference may be unnecessary when relevant information is readily available and an unhindered shareholder vote would provide the appropriate remedy.

[47] *Id.*
[48] *Id.*
[49] *Id.* at 181.
[50] *See Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).
[51] *Id.* at 654-55.
[52] *Id.* at 653.
[53] *Id.* at 656.
[54] *Id.* at 658.
[55] *Id.* at 659.
[56] *Id.* 659-60.
[57] *Id.* at 661-62.
[58] *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990).
[59] *Id.* at 1146.
[60] *Id.* at 1147.
[61] *Id.* at 1147-48.
[62] *Id.* at 1146.
[63] *Id.* at 1149.
[64] *Id.* at 1150-51.
[65] 634 A.2d 345, 350 (Del. 1993).
[66] *Id.* at 366.
[67] *Id.* at 351.
[68] *Id.*
[69] *Id.* at 371.
[70] *Paramount Communications v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994).
[71] *Id.* at 43.
[72] *Id.* at 39.
[73] *Id.* at 46-47 .
[74] *Id.* at 45.
[75] *Id.* at 44.
[76] *Id.* at 45.
[77] *Id.* at 40.
[78] *Id.* at 48.
[79] *Id.* at 48, 51.
[80] *Ace Ltd v. Capital Re Corp.*, 747 A.2d 95, 98 (Del Ch.1999).
[81] *Id.* at 100.
[82] *Id.*
[83] *Id.* at 96.
[84] *Id.* at 103.
[85] *Id.* at 106.
[86] *Id.* at 105-06.
[87] *Id.*
[88] *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43, 46 (Del. 1997)
[89] *Id.*
[90] *Id.* at 47.
[91] *Id.*
[92] *Id.*
[93] 1999 WL 1054255 (Del. Ch. 1999).
[94] *Id.* at *1.
[95] *Id.* at *2.
[96] *Id.*
[97] *In re IXC Communications, Inc.*, 1999 Del. Ch. LEXIS 210.
[98] *Id.* at *7.
[99] *Id.* at *29.
[100] *Id.* at *2-3.

Due Diligence in Acquisitions & Mergers of Long Term Care Facilities

Tydings & Rosenberg LLP

At a time of rapid consolidation in the health care industry, it is helpful for long-term care facilities to have some understanding of the acquisition and merger process. Apart from the negotiation of the terms of the deal, perhaps the most important aspect of mergers and acquisitions is due diligence-the process by which the buyer and the seller investigate each other, primarily through the voluntary exchange of information. In a merger or acquisition, there are frequently two stages of exchanges of information: at the initial review stage, and at the full due diligence stage. Each party needs information obtainable only or most easily from the other to evaluate the transaction-whether to proceed and on what terms.

At the initial review stage, each party needs to make some quick determinations about the other, to assure that both are serious about proceeding, that the buyer has the wherewithal and means to proceed, and that the seller has something worthwhile to sell. Having found a buyer, the seller needs to determine whether the buyer has the resources to consummate the transaction and whether there are any obligations to third parties or other significant issues that would prevent the transaction from concluding. The seller will want information about the financial position of the buyer, frequently in the form of recent financial statements, the identity of third parties with the ability to block the transaction, and the corporate organization documents of the buyer. The buyer, for its part, also needs some information about the seller at this stage. The types of information that a buyer frequently will seek will include the seller"s corporate documents (charter, bylaws, stock ledgers, and minute books), the identities of significant third parties with an interest in the transaction (major creditors, landlords, large customers, large suppliers), identification of the seller"s major assets (tangible or otherwise), the identity of key personnel, the content of collective bargaining agreements, and financial information about the seller, frequently in the form of tax returns and financial statements. In particular situations, a buyer may need other kinds of information from the seller as well.

It is appropriate and commonplace for the parties at this stage to enter into a confidentiality agreement to protect each party"s rights in the confidential and proprietary information being made available. A good confidentiality agreement will address which items are to be provided, as specifically as possible, how items are to be provided, who will have access to the materials after they are provided, how confidentiality will be maintained, and will include a promise not to use the materials for any purpose other than evaluating the transaction, and a mechanism for return of the materials if the transaction falls through. Some situations may also call for exclusive negotiating rights (i.e., the seller cannot shop the

buyer"s offer while the parties are considering whether to proceed), or break-up fees in case one party or the other terminates unilaterally the transaction.

Once the parties have satisfied themselves initially about the transaction, the next phase ordinarily will begin with the execution of a letter of intent, or a similar document, setting forth the framework of the offer, terms, and further investigation and review. Letters of intent will typically address price, structure of the deal (stock purchase, asset purchase), identity of the parties (buyers in some cases require the ability to set up a new entity to be the owner after the sale), payment terms, other applicable conditions of the deal, and the right of each party to conduct further investigation of the other. Other provisions found in letters of intent may include matters relating to governmental or other third party approvals, legal fees, "deal-killer" terms, exclusive dealing rights, and tax allocations of the purchase price.

Upon execution of the letter of intent, both seller and buyer frequently will need to engage in more extensive due diligence. The material to be reviewed will include the matters reviewed during the initial exchange, although perhaps in some greater depth, but the buyer (and to a lesser extent the seller) may need additional material to assist in assuring the buyer as to the quality and nature of what is being acquired, and to assist in assuring the seller that the deal will go through. The additional matters typically reviewed at this stage include real estate issues (title, surveys, zoning issues), lien and judgment searches, intellectual property rights (patents, trademarks, copyrights), closer review of major contracts and leases, review of employee benefit plans, environmental matters, and pending and threatened litigation by or against the seller or buyer. Where public companies are involved, there may be a need to review federal and state securities matters. In appropriate circumstances, there needs to be consideration of antitrust laws, and of matters relating to overseas operations. For long term care facilities, the parties will need to consider applicable state and federal licensing, approvals by appropriate agencies (particularly the Maryland Department of Health and Mental Hygiene), insurance contracts, and the requirements of Medicare/Medicaid and related federal and state statutes and regulations.

The foregoing explanation is obviously only the basics of the process of due diligence, but it should give a fair overview of what happens and what each party can expect. While the provision and review of information and documents can seem tedious, it is critical for both parties to a deal to obtain and consider as much information about the other as possible. Neither party should be surprised once the deal is concluded. Due diligence makes that possible.

For more information on this article or other long term care facilities" concerns, contact Ferrier R. Stillman at 410/752-9731.

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Purchasing or Selling a Business? Using a Deal S.W.A.T. Team

Womble Carlyle Sandridge & Rice PLLC
By Richard N. Drake

Business Tool Box--Law & Business

You have hit the jackpot--you have been offered the business opportunity of a lifetime, say, purchasing your biggest competitor. But wait...before you begin writing checks and signing documents, it is essential that the business be valued appropriately and that you receive good advice in the negotiation of the transaction. In almost all situations, good advisors will be invaluable to you in the successful purchase (or sale) of a business, whether the value of the business is $500,000 or $500 million.

Your three most important allies for this transaction are your financial advisor, accountant and attorney. Your financial advisor can facilitate in locating the parties for the transaction and may act as a negotiating intermediary. Your accountant can aid in the valuation of the potential business, and your attorney can assist in the negotiation and documentation of the transaction. While these key advisors can help in guiding you through the transaction, it is critical that you communicate your intentions, motivations and goals of your business endeavors to them.

A financial advisor may be beneficial in the valuation phase, but the size of the transaction may determine your need for a financial advisor. Having a financial advisor is often advantageous for a seller, since they can "shop" for potential buyers of a business. A buyer can benefit from a financial advisor by their knowledge and review of the marketplace, which is essential in valuing the success of the transaction to your overall business plan. A financial advisor can also serve as a negotiating intermediary between the buyer and the seller to facilitate a smooth transaction.

Another key figure in the valuation process will be your accountant, who will be able to provide information pertaining to tax consequences of the transaction"s structure. Your accountant will also be essential in the review of the seller"s financial statements and, perhaps, its business prospects.

Another important task of your accountant may be in assisting in the calculation of the value of the business you wish to purchase. Your accountant or attorney will arrange for appraisals of the real property and tangible assets. Depending on the nature of the transaction, intangible assets, which include patents, trademarks, trade names and other intellectual property, need to be reviewed and

valued. Part of the purchase price may also include the goodwill of the business, which is the name and reputation of the company and its ongoing business. Demand for the product or service and competition also play an important part in the valuation of the business. Your accountant or financial advisor will use all of these factors and others in determining the fair market value of the assets of the business. As soon as possible, and perhaps as part of determining that the purchase of the business is a good business endeavor, you should meet with your attorney to discuss the proposed business transaction. Your attorney should be involved in every step of the transaction, including structuring the transaction, guiding the negotiations, drafting the essential documents and conducting the closing.

As a preliminary step in the negotiation process, your attorney may suggest entering into a letter of intent with the seller. The letter of intent is usually from the buyer to seller and sets out the terms of the proposed business transaction. However, most or all of the terms of the business transaction are not binding until the execution of a definitive agreement. The letter of intent has a definite time frame in which the business transaction has to completed or the letter of intent expires.

If a letter of intent is used, it should also contain nondisclosure provisions and a "no-shop" clause. Nondisclosure provisions call for the parties to keep confidential any information revealed during the review, or "due diligence," process of privileged business information, including financial statements. A no-shop clause provides that the seller will not enter into negotiations with another potential buyer or sell the business during the time frame of the letter of intent. Your attorney will assist in determining if these provisions are appropriate in your situation.

During the negotiation process, your attorney, with assistance of your accountant"s review of the seller"s financial statements and other materials, will negotiate for the most beneficial structure of the business transaction. There are three basic types of transactional structures: an asset purchase, a stock purchase or a merger. In an asset purchase transaction, the buyer will purchase substantially all of the seller"s assets. Some buyers favor an asset purchase over the other methods, because the buyer is allowed to identify and limit the liabilities and select the assets that it will acquire. Another advantage to an asset purchase transaction is the value of the purchased assets are determined on a "cost basis", thus there is a greater amount to depreciate from the assets. However, there may be certain disadvantages by only purchasing the assets of the business related to the goodwill of the company.

In a stock purchase transaction, the buyer will purchase from the seller the stock of the company. The stock purchase could be a benefit for the buyer if it makes a "338 Election" under Section 338 of the Tax Code, which gives the buyer "step up" in the "basis" of the assets (resulting in lower taxes when sold later), since the transaction is treated as an asset purchase instead of a stock purchase. One disadvantage to the buyer is that it acquires all of the seller"s liabilities and some assets that it would rather not obtain.

With a merger transaction, the two parties merge together and the seller"s shareholders will receive cash or stock of the buyer, or both, depending on how the deal is structured. There may be various tax advantages to a merger, since it usually qualifies as a "tax-free reorganization" under Section 368 of the Tax Code. A merger is often advantageous to sellers, since the buyer acquires by merger all of the seller"s liabilities. Your advisors will assist you in determining the best structure for tax purposes.

Understanding, evaluating and being able to pursue these various alternatives is essential to a successful business transaction. The knowledge and assistance you receive from your financial advisor, your accountant and your attorney will be critical.

In our next article, we will focus on the process of the business transaction, including the importance of

conducting due diligence (understanding the business contracts, litigation, financial affairs, etc.) and obtaining third-party consents.

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Mergers & Acquisitions: A Strategy for High Technology Companies

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By Jacqueline A. Daunt

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Mergers & Acquisitions: A Strategy for High Technology Companies

2002 Update

Introduction

A recent survey showed that between two and five emerging technology companies (TechCos) are acquired for every one that does an initial public offering (IPO). Acquisitions can provide strategic, operating and financial benefits to both TechCo and the company acquiring it (LargeCo). A strategic acquisition can provide TechCo's shareholders with earlier liquidity than an IPO, with less risk and dilution. It also can provide TechCo with the immediate leverage of LargeCo's established manufacturing or distribution infrastructure, without the dilution, time and risk of internal development. A strategic acquisition can provide LargeCo with the new products and technologies necessary to maintain its competitive advantage, growth rate and profitability. Ill-conceived or badly done acquisitions, however, can result in expense and disruption to both businesses, the discontinuance of good technologies and products, employee dissatisfaction and defection, and poor operating results by the combined company. By understanding the key factors that lead to a successful acquisition, TechCo and LargeCo can improve the probability of achieving one.

Why Do Companies Acquire Other Companies?

When considering an acquisition, TechCo's first step should be to identify the strategic reasons why it wants to be acquired. For example, while TechCo may seek liquidity for its founders and investors, it also may have concluded that its future success requires the synergies of complementary resources and access to the infrastructure of a major corporation. An IPO could provide TechCo's shareholders with liquidity, but would not immediately address TechCo's need for product synergy or provide an established infrastructure. Those needs could be better met by finding a strategic buyer for TechCo.

Equally important is to identify LargeCo's strategic objectives in acquiring TechCo. For example, LargeCo may seek to acquire a product line or key technology, gain creative, technical or management talent, or eliminate a competitor. Ultimately, LargeCo will acquire TechCo because it believes acquisition is a more effective means of meeting a strategic need and increasing shareholder value than internal development. If TechCo understands its own and LargeCo's strategic objectives, it can focus on candidates that are most likely to meet its needs and value the assets that it has to offer. While the objectives of individual companies will vary, the following table identifies common strategic objectives that TechCos and LargeCos try to achieve through an acquisition.

Table 1: Common Strategic Objectives for Acquisitions

TechCo Reasons to Be Acquired	LargeCo Reasons to Make an Acquisition
Access to complementary products and markets	Acquire key technology
Access to working capital	Acquire a new distribution channel
Avoid dilution of building own infrastructure	Assure a source of supply
Best liquidity event for founders and investors	Eliminate a competitor
Best and fastest return on investment	Expand or add a product line
Faster access to established infrastucture	Gain creative talent
Gain critical mass	Gain expertise and entry in a new market
Improve distribution capacity	Gain a time-to-market advantage
More rapid expansion of customer base	Increase earnings per share

What Creates Value in an Acquisition?

LargeCo's acquisition objectives will determine which TechCo attributes are the most valuable. If TechCo identifies early the strategic objectives for the most likely LargeCo merger candidates, it can focus its energy on developing those attributes. There are, however, certain TechCo attributes that are likely to enhance TechCo's value. Proprietary technology or products with significant competitive advantage are always valuable. Market leadership in a fast-growing market segment also increases TechCo's value. Studies show that market-share leaders are significantly more profitable than companies with smaller market shares. Strong management in TechCo's areas of value will lend credibility to TechCo's projections of future growth. Nonduplicative infrastructure and relationships add to TechCo's value since LargeCo will not have to terminate redundant personnel or unwind arrangements with unwanted third parties. The greatest source of TechCo value, however, is the financial performance and joint economics expected in the hands of LargeCo. If TechCo reached $5 million in sales in a fast-growing market segment without the benefit of a sales force or an institutional presence, LargeCo's sales force, brand name recognition and established customer base may allow it to increase those results dramatically in the first year with minimal incremental cost.

What Destroys Value in an Acquisition?

Just as there are certain TechCo attributes that are likely to enhance its value, there are also certain TechCo characteristics that are likely to reduce its value. An unprofitable TechCo or one with performance volatility will have difficulty persuading LargeCo that its future performance projections are credible. Excessive liabilities or litigation threats may frighten off LargeCo from an otherwise good deal, unless TechCo's shareholders are willing to indemnify LargeCo for those risks. If key TechCo managers are visibly reluctant to continue working with LargeCo after the acquisition, LargeCo may be concerned about TechCo's ability to perform after the closing. A TechCo that requires substantial capital to accomplish its goals faces two hurdles. It must persuade LargeCo that the goals are attainable with the requested capital, and that it is worth both the purchase price and the additional capital.

Strategically irrelevant TechCo operations tend to defocus or stall merger negotiations. LargeCo does not want to buy such assets, and TechCo will want to be paid for their value or to remove them from the company before the acquisition. It also is dangerous for TechCo to go into negotiations with a limited operating horizon (i.e., with minimal cash). It may find that its only source of bridge financing is LargeCo, which will put it in a much weaker negotiating position. TechCos with a divided Board of Directors, investor group or management team also have a more difficult time in acquisition negotiations. They will find that these groups spend more time negotiating among themselves than in negotiating with LargeCo. Gaining a reputation for being over-shopped also can reduce TechCo's value. It leads LargeCo to believe that many other potential acquirers have already examined TechCo and rejected it as undesirable.

Why Do Some Acquisitions Fail?

Many acquisitions fail to deliver the synergies and value promised. To avoid these pitfalls, TechCo needs to understand the most common reasons why acquisitions fail. If LargeCo does inadequate technical due diligence, it may discover after closing that TechCo's technology does not perform at the expected level. Sometimes, there is a clash between LargeCo's and TechCo's corporate cultures, and TechCo's key personnel become disenchanted or leave. If TechCo's personnel are a critical part of its value, LargeCo should make a special effort to "recruit" them, designing an employment package and environment that will retain and motivate them. There may not be a true strategic fit, and LargeCo may discover that its sale force cannot easily sell TechCo's products. If LargeCo does an inadequate intellectual property audit, it may later discover that TechCo does not have clear title to its technology. Lastly, LargeCo may change its mind about the strategic importance of TechCo's technology or products and conclude that it does not desire to continue them within LargeCo's organization. Most of these problems can be avoided if they are addressed during negotiations and the due diligence process.

Deciding to Be Acquired

Acquisition vs. IPO

When should TechCo pursue a strategic acquisition and when should it pursue an IPO? When evaluating this issue, the following factors should be considered:

Infrastructure. To go public and maintain its stock price, TechCo generally must establish a consistent, stable pattern of growth and profitability. To do that, TechCo will need to establish professional manufacturing, distribution, finance, and administration and management. Building the infrastructure necessary to operate as a successful, publicly traded company is time consuming, expensive and dilutive to the present equity holders. While TechCo may command a higher valuation in an IPO than it can in an acquisition, the potential for a higher valuation may not be worth the expected dilution. Moreover, an independent growth strategy can be risky if TechCo is likely to be overtaken by better capitalized competitors.

IPO Windows. The IPO market is volatile and reacts to factors that are outside TechCo's control. IPO windows may open and close in a cycle different than TechCo's growth, capital and liquidity needs. For example, the adoption of government regulation of, or bad press about, TechCo's industry can affect TechCo's ability to go public. It may not affect the profitability of TechCo's business, however, nor its potential attractiveness to a LargeCo already in that industry.

Public Disclosure. The process of going public requires that TechCo disclose important information about its strategy, competitive advantage and finances that it might prefer to keep confidential. Once

public, such disclosures continue as TechCo is required to file regular 10-Ks, 10-Qs and proxy statements. Moreover, there is an increasing risk that TechCo will be sued by its shareholders if, with hindsight, TechCo's public disclosures prove to be materially inaccurate. TechCo may prefer to be acquired to avoid that public disclosure and potential liability.

Cost. A public offering is expensive. For example, if TechCo wanted to make a $40 million offering, the underwriters typically would take a 7% commission on the stock sold, and the legal, accounting and printing fees would exceed $1,200,000. Complying with the SEC's public reporting requirements imposes additional administrative burdens, requires substantial executive attention and might cost TechCo an additional $50,000 to $150,000 per year. TechCo will find that being acquired generally is less expensive than doing an IPO and LargeCo typically will pay TechCo's reasonable acquisition expenses.

Quarterly Financial Performance. Once TechCo is public, it must publish financial statements and respond to the analysts on a quarterly basis. A public company frequently finds that it makes business decisions with one eye on how the market will respond. By getting acquired by LargeCo, many TechCos hope to be able to focus on long-term investment and business plan execution.

Liquidity for TechCo Shareholders. While TechCo may think that going public will provide its shareholders with liquidity, that liquidity may be initially illusory. Many TechCos sell relatively few shares in their IPO and many more do not get serious analyst coverage. There may be little market interest in TechCo's stock, with few shares trading daily (TechCo's "float"). Further, underwriters will require TechCo's shareholders to sign "Market Standoff Agreements," agreeing not to sell any of their shares into the public market for at least 180 days after TechCo's IPO. TechCo's shareholders may find that, although TechCo is now "public," their stock is relatively illiquid. If TechCo's shareholders receive freely tradable LargeCo stock that has a significant float, they may receive more real liquidity more quickly than is possible through a TechCo IPO.

Positioning TechCo to Be Acquired

The best way for TechCo to position itself to be acquired (or to go public) is to demonstrate consistent revenue and earnings growth and ownership of a fast-growing technology, customer or market franchise. TechCo should consider avoiding early and excessive product or market diversification. Attempting to create multiple products or to attack multiple markets simultaneously strains the resources of an emerging company and reduces the probability that TechCo will execute its strategy well. A more diverse product or market focus also reduces the likelihood of a good strategic fit with LargeCo and increases the probability that some of TechCo's assets will have a low value to LargeCo. TechCo also may want to establish market acceptance of its products through partners instead of establishing its own sales and distribution capability. Using such partnering relationships can enable TechCo to avoid the cost and time of establishing its own production, sales or marketing infrastructure, which will often duplicate that of LargeCo. (See Fenwick & West's booklet "*Corporate Partnering: A Strategy for High Technology Companies*" for a more detailed discussion of partnering.) From a legal perspective, TechCo should ensure that it has clear title to its intellectual property and it should avoid nonassignable or onerous contracts. To avoid accounting disputes during negotiations, TechCo should keep its financial statements in accordance with generally accepted accounting principles (GAAP) and have annual audits.

When Should TechCo Consider Being Acquired?

It is difficult to predict at what stage TechCo will obtain the best valuation in an acquisition. However,

TechCo may be an attractive acquisition candidate at an earlier stage than it expects. For example, TechCo may want to consider being acquired once it:

- Produces a product or service that is:
  - critically acclaimed in the industry trade journals,
  - strongly endorsed by good, referenceable customers, and
  - a strategic fit with LargeCo's products and distribution
- Has a strong development team in a mission-critical area
- Has few conflicting or overlapping products or infrastructure; and
- Is profitable and can demonstrate revenue and profit growth.

This stage may be optimal because TechCo can reach it most quickly, with the least amount of invested capital, personnel and risk.

The Acquisition Process

Once TechCo concludes that it wants to be acquired, it needs to understand the acquisition process. There are several stages involved in preparing for, negotiating and closing an acquisition. Each stage requires the participation of different players. From first contact with an investment banker until completion of the integration of LargeCo and TechCo operations, the acquisition process can take more than a year. The following table shows some of the more important acquisition stages and the key participants during those stages of the process.

Table 2: Acquisition Process and Participants

Participants	TechCo Market Plan	Contact LargeCo Candidates	Negotiate Letter of Intent	Conduct Due Diligence	Negotiate and Sign Agreements	Closing of Merger	Company Integration
Management	✓	✓	✓	✓	✓	✓	✓
Board of Directors	✓	✓	✓				
Investment Banker	✓	✓	✓	✓			
Lawyers			✓	✓	✓	✓	
Accountants				✓	✓	✓	✓

Use of an Investment Banker

Presale Preparation. TechCo may want to obtain advice from an investment banker when it first considers being sold. TechCo should select its banker based on its experience in mergers and acquisitions in TechCo's specific industry doing transactions of similar deal size and its contacts with relevant potential buyers. Before reaching the decision that it should be acquired, TechCo can have an investment banker review its business, financial and strategic plans, and help it evaluate its business alternatives. With early advice, TechCo can address value-enhancing or detracting factors and

sometimes improve its valuation. Based on an analysis of TechCo's business strengths and weaknesses, industry trends, TechCo's competitive positioning, and recent M&A activity, the investment banker can advise TechCo on a range of expected acquisition values. These early activities can help TechCo position itself to command the highest valuation and attract the most qualified prospective purchasers. The investment banker can also prepare a detailed timeline to better prepare TechCo for the length of the process and how much of management's time will be needed.

Assistance During the Marketing Process. Once TechCo decides to be acquired, the investment banker can prepare detailed marketing materials describing TechCo's key attributes. The investment banker approaches the marketing process by conducting a detailed analysis of TechCo, its industry and the strategic reasons why LargeCo might want to acquire TechCo. The investment banker will also prepare a detailed list of potential buyers to be contacted during the marketing process. Using a banker at this stage in the process enables LargeCo to ask "tough" questions of the banker and be more forthright in their evaluation of TechCo without offending TechCo's management.

Due Diligence. When potential buyers conduct initial due diligence on TechCo, the investment banker can assist the process by ensuring that LargeCo gets information necessary to submit a binding offer to acquire TechCo. It is important to anticipate what information will be the most important to LargeCo to avoid embarrassing "surprises" later. The investment banker can assist TechCo by pointing out sources of synergy and supporting TechCo's desired valuation by financial analyses based on comparable public and private companies. Familiarity with TechCo's industry also will allow the banker to suggest alternatives if difficulties arise with a current LargeCo prospect.

Negotiations Phase. During this process, the investment banker will help TechCo determine which offer to accept based on valuation, structure, tax considerations, LargeCo currency (if stock is the primary consideration), and other relevant issues. Once an offer is accepted, it is critical to communicate to the investment banker which issues are most important to TechCo in order to properly position the negotiation discussions. To ensure an efficient final agreement phase, the investment banker can help coordinate communication with TechCo's lawyers and accountants to make certain all of TechCo's advisors understand the implications of the definitive agreement. If requested, an investment banker can provide TechCo's Board of Directors with a formal "fairness opinion" on the terms offered by LargeCo.

Key Deal Issues

If LargeCo and TechCo agree that they are a good strategic fit, the next step is to determine the terms of the LargeCo-TechCo merger. LargeCo's focus will be on paying no more than TechCo's value; structuring the acquisition to obtain the most desirable tax, accounting and risk profile; and negotiating agreements with key personnel. When considering LargeCo's offer, TechCo should keep in mind the needs of its different constituencies. TechCo's shareholders typically want the highest possible price, paid in a liquid but tax-free manner. They also want to limit their personal liability for indemnities and reduce the amount of any consideration held in escrow as security for such indemnities. TechCo's management will want to retain the largest number of TechCo's employees on the best possible terms and have LargeCo deal fairly with terminated employees. On a personal level, TechCo's executives will want to negotiate a good employment package and avoid long noncompetition agreements in case their relationship with LargeCo does not prove successful. Perhaps even more than LargeCo, TechCo's management will want to avoid the risk of a "broken deal." TechCo's employees will be concerned about their jobs, their reporting relationships and the uncertainty caused by the acquisition. To negotiate a successful acquisition, all of these concerns must be addressed.

Valuation and Pricing Issues

TechCo Valuation. One of the most important LargeCo issues is to pay a fair value for TechCo. Valuation is highly subjective. The "fair" value for TechCo will vary significantly from one LargeCo to another, depending on a variety of factors. An investment banker can assist TechCo in determining its valuation and in price negotiations with LargeCo. When negotiating its value, TechCo should remember that public LargeCos, issuing stock in a merger, will not want the merger to be dilutive of their earnings per share (EPS). This means that LargeCo cannot issue so many shares to TechCo's shareholders that the merger reduces LargeCo's EPS. LargeCos typically use three methods to triangulate on a reasonable TechCo valuation.

- ***Comparable Public Companies.*** One way of determining TechCo's value is to take the market value of stocks of comparable, publicly traded companies in TechCo's industry as a multiple of such companies' earnings and revenues. Those values are then adjusted to account for the size, liquidity and performance differences between TechCo and those companies. The difficulty with this analysis is in selecting "comparable" companies and accurately adjusting TechCo's value to reflect the differences between TechCo and such companies.

- ***Comparable Transactions.*** Another way of determining TechCo's value is to compare the amount paid in acquisitions for other companies in TechCo's industry. When using this valuation method, consider the following. While the stock market values all public companies daily, acquisitions occur over time. If a comparable transaction occurred some time before TechCo's proposed transaction, are the factors essential to that valuation still present? Another factor that can influence valuation is the consideration used in the transaction. A LargeCo with a highly valued stock can pay a higher price than a LargeCo with a less valued stock. Alternatively, if TechCo believes that LargeCo's stock is undervalued by the market, it may be willing to accept a lower price at closing on the expectation of market appreciation in LargeCo's stock after the closing.

- ***Discounted Cash Flow Analysis.*** A third way of determining TechCo's value is to assign a value in today's dollars to the cash flow to be generated by TechCo's future operations. This type of analysis has two difficulties. First, under this analysis, TechCo's value depends on the credibility of TechCo's projections of its future operations. While historical performance is a known quantity, LargeCo and TechCo may disagree on how TechCo will perform in the future. Second, a substantial portion of the value represented by this type of analysis is the residual value created by TechCo's investment in early years. This is another likely source of disagreement between LargeCo and TechCo.

- ***Purchase Price Denomination.*** If LargeCo pays cash for TechCo, LargeCo will express the purchase price in dollars. In an acquisition where LargeCo issues stock to pay for TechCo, LargeCo may express its offered purchase price in any of the following ways.

    - *As Dollar Value of Shares.* If LargeCo expresses the price as a certain dollar value of its shares, LargeCo must specify the mechanism for determining the number of shares to be issued at the closing of the transaction. For example, LargeCo could offer that number of shares determined by dividing $25 million by the average of the closing prices of LargeCo's stock for the ten trading days ending three days before the closing of the merger. LargeCo may not want to use this pricing mechanism if it believes that its stock price will fall between the date it signs the merger agreement and the date it closes the transaction. Such a drop in LargeCo's stock price could result in TechCo's shareholders receiving a

significantly larger number of shares in the merger. This could be a problem if such an increase would require LargeCo to obtain the approval of its shareholders (which would not be required if fewer shares were issued) or if LargeCo's management believed that the transaction would become EPS dilutive. TechCo also might worry about a dollar purchase price that calculates the number of shares at the closing date. TechCo will not want the number of shares issued in the transaction to be reduced if LargeCo's stock market price goes up before the closing date. TechCo will want its shareholders to share in market appreciation resulting from a favorable response to the announcement that LargeCo is acquiring TechCo.

- *As Fixed Number of Shares.* These concerns can be eliminated if LargeCo denominates its price as a certain number of shares to be issued in the acquisition. However, this pricing method leaves both parties with the risk that the dollar purchase price could go up or down by millions of dollars between signing and closing the deal. Arguably, the dollar purchase price should not matter to LargeCo as long as the merger will increase LargeCo's EPS. It may matter to TechCo, however, if TechCo has outstanding preferred stock and LargeCo's offered price is not a great deal more than the amount invested in TechCo by its venture investors. The charter documents of many privately held TechCos treat an acquisition as a "liquidation." They typically require that the holders of the preferred stock receive their liquidation preferences before any consideration goes to the holders of the common stock. If a sharp drop in LargeCo's stock price resulted in all of the stock having to be paid to the preferred shareholders, TechCo might find that it would be unable to obtain common shareholder approval of the acquisition. The parties also need to consider how options and warrants will be treated in this calculation. For example, is the number of shares offered by LargeCo intended to be in exchange for outstanding shares, options and warrants, or only for outstanding shares? This issue is particularly sensitive if options or warrants are significantly "under water" (*i.e.*, the exercise price to acquire the TechCo shares is far greater than the price offered by LargeCo).

- *As a Percentage of Combined Entity.* In mergers between companies of relatively equal size, LargeCo frequently will express the purchase price as that number of shares that will give the TechCo security holders a certain percentage of the combined entity. For example, the LargeCo and TechCo security holders will have 55% and 45%, respectively, of the post-closing capital of LargeCo. Parties use this form of pricing when they want to value LargeCo and TechCo based on their expected contribution to the combined company's future performance instead of the market price for the stock. Again, the market value of the transaction can fluctuate dramatically from the date of signing until closing. Again, the parties need to delineate clearly which LargeCo or TechCo shares, options or warrants are included in the numerator and the denominator. Again, either LargeCo or TechCo may argue that "under water" warrants and options should be excluded from the calculation.

- ***Collars.*** One way of dealing with these "market" risks is to price the transaction subject to a "collar." A "collar" is a range of LargeCo stock prices within which there is an agreed-upon pricing method. For example, LargeCo might offer to pay TechCo $25 million of stock within a collar of $10 to $15 per share, 2,500,000 shares if the stock price is less than $10 per share, and 1,666,666 shares if the stock price is greater than $15 per share. This approach ensures that in no event will LargeCo have to issue more than 2,500,000 shares in the acquisition. Alternatively, if LargeCo's stock was trading at $12 per share at the date it was making its offer to TechCo and historically LargeCo's stock had stayed in a range of $10 to $15, it could offer TechCo 2,083,333 shares within a collar of $10 to $15, $31,249,995 of stock if the stock price is greater than $15, and $20,833,333 of stock if the stock price is less than $10. The decision whether to denominate

the price in dollars or shares and with or without a collar depends upon each party's guess about what will happen to LargeCo's stock price between signing and closing and which risk it is most important to avoid.

- *Net Asset Test.* If either LargeCo or TechCo believes that TechCo's balance sheet is likely to become significantly weaker or stronger between the date the definitive agreement is signed and the closing date, it may suggest that the purchase price be adjusted to reflect a change in TechCo's net assets. For example, if TechCo had $2 million of working capital at the date of signing and LargeCo expected it to decline to $500 thousand by the closing date, LargeCo might want to have the purchase price reduced to reflect that change. On the other hand, a profitable TechCo might negotiate to have LargeCo increase the purchase price by the amount of any increase in its working capital from the signing date to the closing date.

- ***Earnouts.*** In an "earnout," some portion of TechCo's purchase price will be paid by LargeCo only if TechCo achieves negotiated performance goals after the closing. Parties typically use an earnout when they agree that a higher TechCo valuation would be justified if TechCo were to meet forecasted performance goals. TechCo may propose an earnout when it believes that its future performance will be substantially better than its historical performance. Likely earnout candidates include an early stage TechCo with a product line separate from that of LargeCo, a turnaround TechCo or a TechCo in a hot industry sector. Well-considered earnouts can allow TechCo to increase its sale price, provide continuing motivation to TechCo's management, and increase TechCo's value in the hands of LargeCo. Earnouts, however, are difficult to manage, and, since the goals agreed upon at closing are rarely relevant 2 years later, tend to create divergent incentives for continuing management. Ill-conceived or badly implemented earnouts can demotivate TechCo's management, reduce TechCo's value to LargeCo, and result in litigation. (See Fenwick & West's booklet "*Structuring Effective Earnouts*" for a more detailed discussion of this method of pricing an acquisition.)

Risk Reduction Mechanisms

There are inherent risks in negotiating, documenting and closing an acquisition since the parties have to make critical decisions regarding price and terms based on partial knowledge. There follow some mechanisms used by LargeCo and TechCo to manage these risks.

Exclusive Negotiating Period. At the time the parties agree on price and the other key deal terms, LargeCo generally will require TechCo to cease negotiating with other potential buyers and negotiate exclusively with LargeCo. LargeCo will not want to invest substantial time and resources in performing due diligence and negotiating a deal with TechCo, only to have TechCo use LargeCo's offer to start a bidding war by other potential buyers. TechCo will want to keep the period during which it has to pull itself off the market as short as possible. To meet its fiduciary obligations, TechCo's Board of Directors will want to reserve the right to notify its shareholders of other offers and may even reserve the right to accept unsolicited and clearly superior offers. The exclusive negotiating period should be no longer than reasonable for LargeCo to complete due diligence and negotiate the definitive documents - usually between 30 and 60 days.

Break-Up Fee. Both LargeCo and TechCo may be concerned that they will be damaged if the deal fails to close after they have signed definitive acquisition agreements and announced the transaction. As noted above, LargeCo will not want TechCo to use LargeCo's offer to start a bidding war. TechCo will worry that an acquisition announcement may cause its customers to delay orders until they know whether LargeCo intends to continue marketing and supporting existing TechCo products. Similarly, if

the announcement causes TechCo's employees to focus on their resumes instead of on their jobs, TechCo can be seriously damaged if the acquisition fails to close. Either LargeCo or TechCo may propose a "break-up fee" as a way to address this risk. A "break-up fee" requires the party responsible for the break-up to pay the other party a negotiated amount of liquidated damages. The amount of the break-up fee should reflect the damages likely to be sustained by the damaged party. Some parties dislike break-up fees because they believe that it implies permission not to close (as long as the break-up fee is paid) and they would prefer an unequivocal obligation to close.

LargeCo Due Diligence. LargeCo will do much of its due diligence under a non-disclosure agreement signed with TechCo before the parties agree on a letter of intent. Many TechCos, however, will not give LargeCo access to their most confidential financial, technical, intellectual property, and customer information until a price has been negotiated. As a result, LargeCo must decide whether TechCo is a strategic fit and arrive at a proposed purchase price based on its own product and market due diligence, without access to TechCo's more detailed information. Once the parties agree upon the basic deal terms and while LargeCo's lawyers are preparing the definitive agreements, LargeCo will conduct due diligence to discover if its assumptions about TechCo were accurate. LargeCo generally will want to do due diligence in the following areas: product/technology, sales/marketing, financial/accounting, and legal/intellectual property. (See Fenwick & West's booklet "*Acquiring and Protecting Technology: The Intellectual Property Audit*" for a more detailed discussion of due diligence issues when acquiring technology.) LargeCo and TechCo should try to identify and discuss particular sensitivities or unusual problems or liabilities as early in the due diligence process as possible. Early disclosure is more efficient, builds credibility, and is less likely to result in last-minute price renegotiations.

LargeCo should avoid placing an unnecessary burden on TechCo staff during the due diligence process. TechCos rarely have the administrative and financial infrastructure that LargeCo has, and do not maintain the same type of records. It is often preferable to have LargeCo's personnel do much of the due diligence. This enables LargeCo to obtain more accurate information in the form expected, and will reduce the burden on TechCo. LargeCo also needs to be sensitive to confidentiality concerns. A stream of LargeCo personnel, Federal Express envelopes with LargeCo's return address, or faxes containing confidential information sent to locations that are not secure can easily result in rumors that LargeCo intends to acquire TechCo. Lastly, LargeCo should remember that the purpose of due diligence is to quantify risk, not to bring TechCo's records into line with LargeCo's. Such conforming changes can be accomplished after the merger.

If LargeCo discovers unexpected TechCo liabilities during the due diligence process, it may withdraw from the deal, reduce its offered price, or ask TechCo's shareholders to indemnify it for damage from unusual liabilities. TechCo should avoid allowing LargeCo to put a "due diligence out" in the definitive acquisition agreement. A "due diligence out" is a condition to closing that allows LargeCo to decide at the closing whether TechCo is too risky to acquire. To avoid the risks of customer confusion, employee distraction and the reputation of being "left at the altar," TechCo should require LargeCo to complete all due diligence before signing and announcing the definitive agreement. LargeCo generally will insist on the right to refuse to close if there is a "material adverse change" in TechCo's business between signing and closing. If TechCo anticipates that the merger announcement will cause such a change, the parties should negotiate a definition of "material adverse change" that will not penalize TechCo for expected changes to its business, yet will protect LargeCo from unexpected material adverse changes to TechCo's business.

TechCo Representations and Warranties, Indemnities and Escrows. Besides doing its own due diligence, LargeCo's definitive agreement will contain detailed representations and warranties about TechCo's business. If those representations are inaccurate, TechCo is expected to disclose the

inaccuracies in an "exception schedule" detailing TechCo's problems and liabilities. LargeCo also will ask TechCo to attach detailed lists of TechCo's assets, contracts and liabilities to the definitive agreement as part of TechCo's "disclosure schedule." If LargeCo suffers damage because a privately-held TechCo failed to disclose any of the requested information, LargeCo will expect TechCo's shareholders to indemnify it. Given this indemnity obligation, TechCo should strive for complete and accurate disclosure. To mitigate against an unreasonable disclosure burden, however, TechCo will want to limit some disclosure obligations to those items that are "material" to TechCo or of which TechCo has "knowledge."

Every business has liabilities that arise in the ordinary course. It is inappropriate (and harmful to the relationship with continuing TechCo management) for LargeCo to make claims for every dollar of liability that is discovered after the closing. To reflect this reality, TechCo will want its breaches to cause a certain threshold of damages (called a "basket") before LargeCo has any right to indemnification. Once the basket limit is reached, however, LargeCo will want to recover all its damages, including the basket, while TechCo will prefer that LargeCo recover only the damages in excess of the basket. TechCo will want to limit potential liability under the indemnity while LargeCo will prefer unlimited liability for damages. When TechCo's major shareholders are also its key managers, TechCo should expect requests for broader indemnities and escrows. When outside investors hold most of TechCo's shares, however, they will want to limit the dollar amount of their personal liability for indemnities. They also will prefer to limit LargeCo to a negotiated amount of escrowed consideration.

LargeCo also may want to hold a portion of the merger consideration in escrow as security for such indemnity obligations. Since acquisitions can no longer be accounted for as a "pooling," acquirers are asking for larger and longer escrows. It is unlikely that 10% of the shares issued going into escrow for one year for breaches of general representations and warranties will continue to be the norm. To minimize conflicts over escrow claims, LargeCo and a TechCo shareholders' representative should have regular scheduled post-closing meetings to identify and address indemnity issues.

Escrows and shareholder indemnities are rare in acquisitions of a publicly-held TechCo. In public-public acquisitions, LargeCo generally will assume the risk of problems discovered post-closing.

TechCo Due Diligence. If LargeCo is paying cash for TechCo at the closing, there is little need for TechCo to do due diligence on LargeCo. If LargeCo is paying for TechCo with its stock, a promissory note or an earnout, however, TechCo will want to do due diligence on LargeCo. Many of the considerations relating to LargeCo's due diligence will apply when TechCo is doing due diligence on LargeCo. If LargeCo is public, its federal securities filings will supply much of the desired information, although TechCo may want more detailed information about LargeCo's operations.

Key Shareholder Pre-Approval. One acquisition risk is whether TechCo's shareholders will approve the acquisition negotiated by TechCo's management and approved by TechCo's Board of Directors. TechCo will have similar concerns if LargeCo must obtain its shareholders' approval. Legal formalities required to obtain shareholder approval mean that there will be a delay between signing the definitive agreement and obtaining shareholder approval to that agreement. To manage this risk, the parties may want to ask key shareholders (officers, directors and 10% shareholders) to sign an Affiliates Agreement at the time the definitive acquisition agreement is signed, agreeing to vote in favor of the transaction.

License to Key Technology. If LargeCo's principal reason to acquire TechCo is to obtain a critical piece of technology, LargeCo may want to negotiate a license to that technology. The license could be signed at the same time as the definitive acquisition agreement since it would rarely require shareholder

approval or compliance with time-consuming legal formalities. Thus, even if the acquisition did not close, LargeCo would still have access to the critical technology. TechCo will want to ensure that the license terms would be acceptable if the acquisition did not close.

Personnel Issues

Stress Level. Acquisitions are, by their nature, highly stressful. First, there is the unavoidable increase in work load required by the acquisition process. TechCo's managers need to negotiate the deal, respond to due diligence requests, generate requested schedules, and make decisions regarding the integration of the two companies, all in addition to handling TechCo's day-to-day operations. Second, there is the uncertainty about the future. Who will be kept and under what financial terms? Who will be fired? How will operations change in the new organization? Third, a potential acquisition creates mass personal insecurity. Everyone in TechCo's organization will be concerned about his future and his ability to perform in the new organization; rumors *will* abound and TechCo's ability to perform *will* deteriorate. It is in the best interests of both LargeCo and TechCo to minimize the effects of this stress. Absent the type of planning recommended below, LargeCo may find that TechCo experiences employee turmoil, low morale and poor financial performance because of the acquisition. To minimize the impact of employee turmoil, and particularly if TechCo's and LargeCo's corporate cultures are substantially different, the parties may want to engage an organizational development consultant to assist them with the integration issues.

Confidentiality. Acquisition negotiations must be kept strictly confidential until LargeCo and TechCo have signed the definitive acquisition agreements and are prepared to answer the myriad questions that arise upon an announcement of the acquisition. The fewer people who know about acquisition negotiations and the shorter the period that they are required to maintain confidentiality, the more likely each company will be to manage information release successfully. To assist in maintaining confidentiality, most LargeCos use code names instead of TechCo's real identity on internally generated documents. Initial meetings should be held off-site and in locations where the principals are unlikely to be observed. The parties should try to limit the more intrusive types of LargeCo due diligence until it is certain that the agreement will be signed, rather than risk early leaks and employee disruption.

Key Employees. LargeCo and TechCo need to identify which TechCo personnel must be retained as board members, executives or key employees and the key factors necessary to retain and motivate them. This issue needs early focus and should be resolved *before* the parties announce the acquisition. LargeCos tend to think of compensation matters as a "human resources" detail; whereas it may be a "show stopper" to the affected employee. Salary, bonus, stock option and other compensation arrangements and reporting relationships must be discussed and agreed upon. To maximize employee retention, however, the parties also should address more intangible issues of corporate culture. Some TechCo employees will want assurances that they will not be required to move. For others, the key issue may be the availability of cutting-edge technological tools or additional personnel in an area where they have had inadequate resources. LargeCo should plan to interview each key TechCo employee to recruit him or her to join the LargeCo team. As soon as possible after the announcement, LargeCo should commence the process of weekly team-building meetings between the counterparts from the two companies. These should continue until employee surveys indicate that there has been a successful integration of TechCo's key employees with their LargeCo counterparts.

Reduction in Force. Just as LargeCo and TechCo need to determine which employees must be retained, they also must decide which employees will become redundant. If TechCo has more than 100 employees and the acquisition will result in more than 50 employees being terminated, the parties must comply with the Worker Adjustment and Retraining Notification Act. The WARN Act requires that

terminated employees receive either 60 days' termination notice or 60 days' severance pay. The parties should determine for what period terminated employees will be needed to integrate TechCo into the LargeCo organization. They then should design a "transition" package that motivates them to remain with TechCo during the transition period. One way of providing such motivation is to condition special option vesting, severance and bonus payments on remaining during the transition period. Out-placement and resume assistance programs should be provided, if possible. The parties should determine transition packages and assistance programs before the acquisition is announced to TechCo's employees. LargeCo personnel should meet with each employee on the day of the acquisition announcement to explain the details of his or her individual package and answer any questions he or she may have regarding insurance and out-placement services. It is important to handle terminations with dignity and compassion. Failure to do so will result in low morale for those who have lost their jobs and turmoil in the departments concerned. It also may result in distrust and resentment by the employees that LargeCo wants to retain and motivate.

Noncompetition Agreements. The two most important noncompetition agreement issues are scope of the noncompete and price. Ideally, the noncompetition agreement should be no broader than the product and market area that TechCo is selling to LargeCo. If the key employee is a significant TechCo shareholder, it is not necessary to pay additional consideration for the noncompetition agreement. If the key employee owns little or no TechCo stock, however, LargeCo needs to consider the fairness of expecting him or her to sign a noncompetition agreement without additional consideration.

In California, it is not clear that a noncompetition agreement is enforceable against an employee who holds less than 3% of TechCo's stock. The parties should get tax advice if they intend to allocate a portion of the purchase price to the noncompetition agreement since it can have significant tax consequences.

Golden Parachutes. "Golden parachutes" are arrangements that provide a key employee, because of a change in control of the company, with benefits equal to three or more times such employee's average annual compensation over the last five years. Recipients of golden parachutes must pay a 20% excise tax, which is not deductible by the acquired corporation. Under certain limited circumstances, golden parachutes can be exempted if they are paid by
privately held TechCos who obtain specific shareholder approval in connection with the acquisition. Given the penalties involved, however, TechCos should consult their tax advisors before putting in place any golden parachutes.

Employee Benefit Issues. The parties should discuss how the acquisition will affect TechCo's health plans, profit sharing plans, bonus plans, employee loans, stock options and other employee benefits. While LargeCos typically have more complete employee benefits than TechCos, some TechCo perquisites, such as generous car allowances and country club memberships, may be discontinued. TechCo also should consider the tax ramifications to employees of early option exercises. For example, employees may owe alternative minimum tax on the difference between the fair market value of TechCo's stock on the date of exercise and the option exercise price of incentive stock options exercised before an acquisition.

TechCo 401(k) Plan. If TechCo has a 401(k) plan it should be reviewed carefully to determine if there are unique features that should be carried over to LargeCo's 401(k) plan. LargeCos typically merge the plans and the investment vehicles after the merger and transfer TechCo's records for its plan assets. Before merging the plans, LargeCo will want to verify whether TechCo's plan complies with the pension plan discrimination tests.

Acquisition Structure

Another key issue is how LargeCo wants to structure the acquisition. For example, does LargeCo want to acquire TechCo's stock or its assets? There follows a table and summary of possible acquisition structures and their impact on key business considerations:

Table 3: Acquisition Structure Alternatives

Business Considerations	Merger	Asset Purchase	Stock Purchase
What do you buy?	TechCo's stock	Specified TechCo assets & liabilities	TechCo's stock
Can LargeCo avoid TechCo liabilities?	No	Yes	No
What TechCo shareholder approval is required?	Typically majority vote	Typically majority vote	Must contract with each TechCo shareholder

Merger. In a merger, either TechCo or LargeCo (or LargeCo's subsidiary) merges into the other by operation of law, with TechCo's shareholders exchanging their shares for LargeCo shares. A merger is the simplest mechanism for acquiring another company and results in LargeCo (or LargeCo's subsidiary) automatically receiving all of TechCo's assets. State merger laws typically require majority TechCo shareholder consent to approve a merger. The law also provides a mechanism for cashing out those TechCo shareholders who are unwilling to accept LargeCo stock in the merger (dissenting shareholders). A drawback to using a merger is that LargeCo (or its merger subsidiary) will automatically assume all of TechCo's liabilities. LargeCo can exchange its stock, promissory notes or cash for the TechCo stock in a merger.

Asset Purchase. If LargeCo wants to avoid unrelated TechCo liabilities, it may prefer to acquire TechCo's assets rather than merge with TechCo. Asset acquisitions require that the parties specify the assets and liabilities to be transferred and thus entail more due diligence and transfer mechanics than a merger. LargeCo can exchange its stock, promissory notes or cash for TechCo's assets.

Stock Purchase. LargeCo may want to purchase all of TechCo's outstanding stock from TechCo's shareholders. This commonly occurs if TechCo has very few shareholders or if TechCo or LargeCo is a foreign company that cannot legally do a merger. Since LargeCo acquires all of TechCo's stock, TechCo remains in existence as LargeCo's subsidiary, with all of its assets and liabilities intact. One significant drawback to a stock purchase is that, unlike a merger, the law does not provide a means of cashing out large numbers of "dissenting shares" under a stock purchase. Most LargeCos are unwilling to have minority shareholders, which could occur if a TechCo shareholder refused to agree to sell his or her shares to LargeCo on the offered terms. As a result, a stock purchase is impractical if TechCo has either many shareholders or even one shareholder with substantial holdings who strongly disapproves of the acquisition.

Type of Consideration Used

What consideration will LargeCo use in the acquisition? The most common choices are cash (in a fixed amount or in an "earnout"), stock, debt and assumption of liabilities. From LargeCo's perspective, a cash transaction is the simplest and fastest to accomplish, but it will reduce the amount of cash available

for other purposes. For TechCo's shareholders, a cash transaction offers maximum liquidity, but will be immediately taxable (although installment treatment may be possible for cash basis tax payers if the cash is to be paid over time). If they believe LargeCo's stock is a good investment, TechCo's shareholders may prefer freely tradable LargeCo stock. It is highly liquid, yet tax can be deferred until it is sold. LargeCo may wish to pay with a promissory note due over time. Using debt may permit LargeCo to defer the cash drain for the acquisition until TechCo's assets are producing the cash flow with which to pay off the note. TechCo's shareholders, receiving a note on the sale of TechCo, may be concerned that LargeCo will be unable or unwilling to pay off the note when it becomes due. Absent a LargeCo with substantial assets, TechCo may insist that such a note be secured by the assets sold to LargeCo. The following table summarizes some of the key business considerations involved in selecting from among the three most commonly used forms of acquisition consideration:

Table 4: Acquisition Consideration Alternatives

Business Considerations	Cash	Stock	Promissory Note
How liquid is it?	Most liquid	Depends (whether stock is restricted or freely tradable)	Not liquid
Can it be tax-free?	No (but installment treatment may be available for cash basis tax payers)	Yes (tax is deferred until the shareholder sells his LargeCo stock)	Yes (tax is deferred until payments are made under the note)
What is the level of risk?	No risk	Depends (subject to LargeCo performance and market risk)	Depends (subject to LargeCo credit worthiness)
What is the impact on transaction speed?	Fastest	Slowest (because of securities law compliance)	Slower (because of securities law compliance)

Tax-Free Acquisition

A completely "tax-free" acquisition is one in which TechCo's shareholders exchange their TechCo stock solely for LargeCo stock, or cause TechCo to transfer its assets to LargeCo solely for LargeCo stock. The TechCo shareholders will have the same basis in the LargeCo stock issued in the merger as they had in their TechCo stock. Provided they receive only LargeCo stock in the transaction, TechCo's shareholders will pay tax on the gain only when they sell their LargeCo stock. If TechCo's shareholders believe that LargeCo's stock is a good investment, converting their TechCo investment into LargeCo stock on a tax-free, instead of after-tax, basis is beneficial. TechCo's shareholders will be currently taxed on any cash received.

The following table shows the matrix of possible tax-free acquisition structure alternatives and their impact on key business considerations. Each alternative is discussed in greater detail below.

Table 5: Tax-Free Acquisition Structure Alternatives

Business Considerations	Merger	Asset Purchase	Stock Purchase

How much stock must be used to have the stock received be tax-free?	Straight - 50% stock Forward triangular - 50% stock Reverse triangular - 80% stock	80% stock	100% stock
What is the surviving structure? (having a subsidiary means continuing administrative burden and liability insulation)	Straight - LargeCo holds TechCo's assets Forward triangular - LargeCo's subsidiary holds TechCo's assets Reverse triangular - LargeCo holds TechCo as a subsidiary	LargeCo holds TechCo's assets	LargeCo holds TechCo as a subsidiary
Who gets taxed if tax-free requirements are not met?	Straight or forward triangular - LargeCo & TechCo's shareholders Reverse triangular - TechCo's shareholders only	TechCo and TechCo's shareholders	TechCo's shareholders
What is the effect of doing a taxable deal on basis?	Straight or forward triangular - Step-up in basis of TechCo assets Reverse triangular - Step-up in basis of TechCo stock	Step-up in basis of TechCo assets	Step-up in basis of TechCo stock
How does LargeCo benefit from doing a taxable deal?	Straight or forward triangular - Greater depreciation on TechCo assets Reverse triangular - Less gain if LargeCo sells TechCo stock	Greater depreciation on TechCo assets	Less gain if LargeCo sells TechCo stock

The following check list of key requirements for obtaining tax-free treatment of an acquisition is for purposes of identifying areas of concern only. Since these rules are dynamic and complex, you should consult your tax advisor regarding the application of these requirements to your company and facts. To qualify as a tax-free reorganization under the Internal Revenue Code, several requirements must be satisfied. Two of the more important are that LargeCo must continue TechCo's business in some form and TechCo's shareholders must not sell back their LargeCo shares received in the merger to LargeCo after the acquisition (the "continuity of interest" test). There are three ways of accomplishing tax-free acquisitions:

Merger. A merger can offer the most flexibility in structuring a transaction in a way that is tax-free to TechCo's shareholders. There are three types of mergers:

- ***Straight Merger.*** In a straight merger, TechCo merges directly into LargeCo, with LargeCo surviving the merger. LargeCo ends up holding all TechCo's assets and is liable for all TechCo's liabilities. In a straight merger, at least 50% of the consideration paid needs to be stock to get tax-free treatment for the stock received. A straight merger permits the most flexibility with respect to consideration.

- ***Forward Triangular Merger.*** In a forward triangular merger, TechCo merges into a newly formed subsidiary of LargeCo, with LargeCo's subsidiary surviving the merger. LargeCo's subsidiary ends up holding all TechCo's assets and is liable for all TechCo's liabilities. As in a straight merger, at least 50% of the consideration paid in a forward triangular merger needs to be stock to get tax-free treatment for the stock received. In a forward triangular merger, TechCo's liabilities are isolated in LargeCo's subsidiary, without putting the remainder of LargeCo's assets and business at risk.

- ***Reverse Triangular Merger.*** In a reverse triangular merger, a newly formed subsidiary of LargeCo merges into TechCo, with TechCo surviving the merger. Since TechCo survives the merger, it retains all its assets and liabilities without any need to have them assigned to LargeCo or LargeCo's subsidiary. A reverse triangular merger frequently is used when critical TechCo contracts or licenses have nonassignment provisions, and there is real concern that consent will not be granted or will be granted only after extorting additional consideration from LargeCo. LargeCo also may propose a reverse triangular merger in some cases if it believes that the merger may fail to qualify as a tax-free reorganization. If that happens in a reverse triangular merger, there will be a tax risk only to TechCo's shareholders. If it happens in a straight or forward triangular merger, LargeCo must pay TechCo's corporate level tax too. For example, if TechCo had a basis in its assets of $2 million and was sold to LargeCo for $40 million, LargeCo could be faced with tax liability on $38 million of gain. Thus, if LargeCo is paying a high price for a TechCo with a low basis in its assets, it may view the reverse triangular merger as having significantly less tax risk. For a reverse triangular merger to be tax-free with regard to the stock received, at least 80% of the total consideration paid must be stock and TechCo must retain substantially all of its assets.

Stock for Assets Acquisition. In a stock for assets acquisition, LargeCo issues its stock to TechCo in exchange for substantially all of TechCo's assets. If the desired assets make up substantially all of TechCo's business, LargeCo can avoid acquiring strategically irrelevant operations that it does not want, as well as unrelated TechCo liabilities. LargeCo can offer cash and assumed liabilities for nearly 20% of the total consideration paid and still have TechCo receive the stock portion on a tax-free basis. TechCo must liquidate and distribute LargeCo's shares to its shareholders to avoid corporate and shareholder level tax. LargeCo may prefer a taxable, instead of tax-free, acquisition of assets. A taxable asset purchase gives LargeCo a "step-up" in the basis of TechCo's assets to their current fair market value. In a tax-free transaction, these assets are carried over to LargeCo's balance sheet with the same depreciated value at which they were carried on TechCo's balance sheet. Thus, a taxable asset purchase provides LargeCo with larger tax deductions for depreciation (of tangible assets) and amortization (of intangible assets) than are available under a tax-free asset purchase. Of course, in a taxable asset purchase TechCo must pay corporate level tax on the sale and TechCo's shareholders must pay tax on the consideration distributed to them. This is not a problem if TechCo has a net operating loss (NOL) greater than the purchase price and if the purchase price is less than the amount the TechCo shareholders invested in TechCo. In that event, there is no gain, and no income or capital gains tax would be due. The transaction still would be subject to sales tax, however.

Stock for Stock Acquisition. In a stock for stock acquisition, TechCo's shareholders exchange their shares solely for LargeCo's stock. After the exchange, LargeCo must own at least 80% of TechCo's stock. Since only LargeCo stock may be used, stock for stock acquisitions are the least flexible in the type of consideration that may be used.

Acquisition Accounting

On June 29, 2001, The Financial Accounting Standards Board (FASB) adopted Statements of Financial Accounting Standards No. 141, Business Combinations and No. 142, Goodwill and Other Intangible Assets. Statement 141 eliminated pooling accounting for acquisitions unless they were initiated prior to July 1, 2001. An acquisition is deemed "initiated" once the companies are in price negotiations. Statement 142 changed the rules on amortization of intangibles. Under Statement 142, intangibles such as patents, copyrights, etc. will continue to be amortized over their life, but goodwill is no longer subject to amortization. Instead, goodwill must be reviewed annually, or more frequently if impairment indicators arise, for impairment and if goodwill is found to be impaired it must be written down to the extent of the impairement. **Acquisitions initiated after July 1, 2001 must be accounted for as a purchase, but the goodwill will not have to be amortized.**

Up until June 30, 2001, many LargeCos preferred to have an acquisition accounted for as a "pooling" instead of a "purchase." Prior to that date, in a tax-free merger accounted for as a purchase, the income statements of TechCo and LargeCo were combined only after the closing of the acquisition. TechCo's assets were recorded on LargeCo's balance sheet at their fair market value on the date the acquisition was consummated. The difference between the price paid by LargeCo and the net book value of TechCo's assets was treated as goodwill, which was then amortized as expense against LargeCo's future income creating a "hit to its earnings," without a corresponding tax deduction. Purchase accounting was generally not desirable when acquiring TechCos because much of their value relates to their technology that has little, if any, book value. Since TechCos tend to expense the vast majority of the money they expend on technology development, these valuable assets generally are carried at very low balance sheet values, resulting in large goodwill charges that would reduce the LargeCo's earnings for many years to come.

In pooling accounting, the historical financial statements of LargeCo and TechCo were combined and restated as though the two companies had always been one. TechCo's net asset values were not revised. They were carried over onto LargeCo's balance sheet at the same value at which they had been carried on TechCo's balance sheet. No goodwill was recorded and therefore none needed to be amortized. There was no "hit to LargeCo's future earnings."

There were significant structuring drawbacks to using pooling accounting. Among the pooling restrictions:

- the transaction had to be solely for common stock of the acquirer,
- no more than 10% of the consideration could be paid out for fractional shares and dissenters,
- the target could not change its equity structure in contemplation of the transaction,
- no more than 10% of the consideration could be held in escrow to indemnify the acquirer for breaches of general representations and warranties;
- the escrow had to terminate at the earlier of the first audit (for items covered by audit) or one year from closing;
- affiliates of both companies were prohibited from selling shares from a period beginning 30 days prior to closing until the release of financial statements containing at least 30 days of combined operations; and
- no other restrictions on resale or voting could be imposed on shares issued to the target.

With the elimination of pooling, companies have much more flexibility on how they structure their transactions. Targets can reprice options, cut special severance, vesting or compensation deals with executives, or negotiate a partially stock and partially cash transaction for example. Acquirers can impose resale restrictions on stock, or require larger escrows and hold the escrowed shares for a longer period. Affiliates of neither the target or the acquirer will be subject to the pooling lockup.

Troubled Company M&A Issues

Acquisitions often occur during a down-turn in the economy or when TechCo's valuation is depressed or it is near insolvency or bankrupt. While these circumstances create a myriad of other issues, the following section addresses two of the most common: how does TechCo keep its key employees motivated to help sell the company and what structure should be used to acquire a TechCo near insolvency?

Employee Incentive Issues

The Problem. A TechCo that was venture backed may find that the total liquidation preferences required by its charter to be paid to the holders of the preferred stock on an acquisition exceed any reasonably expected price that could be offered for TechCo. For example, a company might have raised $50 million in invested capital, yet only be worth $10 million. Employees realize that if the purchase price is allocated in accordance with the preferred stock liquidation preferences, they, as holders of common stock, will receive nothing in the acquisition. Management becomes demoralized and may be unwilling to support an acquisition that will only benefit the holders of the preferred stock. This conflict could stall or even foreclose acquisition negotiations.

The Solution. TechCo can solve this problem by creating a cash or stock bonus plan or by doing a recapitalization. Frequently, a cash retention bonus plan is the simplest solution. There follows a table and summary of major considerations in adopting key employee incentive plans:

Table 6: Employee Incentive Plan Alternatives

Characteristic	Cash Bonus Plan	Stock Bonus Plan	Recapitalization
Tailor to Benefit only Key Players?	Yes	Yes	No
Requires Shareholder Approval?	Generally, No	Yes	Yes
Requires Securities Compliance?	Generally, No	Yes	Yes
Employees Taxed When?	Receipt	Receipt	Sale of Stock
Employees Taxed at What Rate?	Ordinary Income	Ordinary Incom	Capital Gains
Reduces Total Liquidation Preferences?	No	No	Depends

Cash Retention Bonus. A cash retention bonus plan can be structured to be offered only to those employees who are critical to the continuing entity, promising them a cash bonus if they stay through the acquisition. The bonus can be a set dollar amount or calculated as a percentage of the purchase price paid. Such a plan is easy to implement, easily understood by the participants, cost effective and generally does not require shareholder approval or securities law compliance. A contractual obligation by TechCo to pay cash bonuses to its employees will be assumed by LargeCo in a merger. LargeCo will, of course, reduce the purchase price offered by the amount of the retention bonus and thus reduce the amount paid to the holders of the preferred stock. In the above scenario, the holders of the common

stock (including the employees) would receive nothing for their shares in the acquisition. The employees receiving the cash bonus will be taxed at ordinary income tax rates (rather than the capital gains rates they would likely have enjoyed had the employees received payment for their common stock). Note that if LargeCo were to do an asset acquisition and did not assume the obligation, whether the employees got paid would depend on whether there was enough consideration to pay the bonus. Once bonuses have accrued, they are considered "wages" which must be paid by the employer. If the "employer" cannot pay, under some circumstances the individual officers and managers may be individually liable for the unpaid wages.

Stock Bonuses. Stock bonus plans are sometimes used in place of cash bonus plans. In order for the participants to receive anything in the acquisition, however, the stock bonused must be senior in priority to some or all existing preferred stock or the bonus plan must require payment in LargeCo's stock in the acquisition. In some cases TechCo will adopt a new stock option plan which provides certain key employees with options to buy a new class of stock with senior participation rights. To implement these plans, the company must amend its charter and obtain shareholder approval. Further, in California, the California Department of Corporations (the "Department") requires that stock bonus plans and such changes in the charter be qualified or exempt from securities qualification. TechCo would have to either qualify the bonus plan and charter amendment with the Department or limit the participants to those who are officers, directors, accredited investors or those who are sophisticated in financial matters. Some critical employees that TechCo wishes to retain may not qualify for this exemption. Further, the participants will recognize tax upon receipt of the bonused stock valued at its fair market value and, if the acquisition currency is unregistered stock, participants may not be able to sell the stock in time to pay their taxes. Given a stock plan's additional complexities and limited benefit, a cash bonus plan may be preferable.

Recapitalizations. TechCo could also do a recapitalization. If TechCo had raised $50 million and is now valued at $4 million, it could recapitalize by amending its charter to allow the common stock to receive up to X in acquisition proceeds before the preferred, but leave the preferred liquidation preferences unchanged. Alternatively, TechCo could amend its charter to convert outstanding preferred stock (which had $50 million in liquidation preferences) into a new series of preferred stock with, for example, only $3 million in liquidation preferences, leaving $1 million for distribution to the holders of the common stock. This approach reduces total liquidation preferences, in effect, restarting the company. Either will require amending the charter and obtaining preferred shareholder approval, which may be difficult to obtain. In addition, note that all common shareholders (including former employees) benefit under recapitalizations, rather than just those employees who are currently critical. TechCo would have to qualify the charter amendment with the Department unless the current holders of the preferred stock are all officers, directors, accredited investors or those who are sophisticated in financial matters or another exemption is available. If unsophisticated investors hold preferred stock, an exemption may not be available. Filing with the Department for a permit will increase the cost of doing the recapitalization, and, if the Department will not grant a required permit, it will be impossible to do the recapitalization. A recapitalization is most likely to be used when TechCo is raising new money and the new investor is not willing to invest unless the employee retention issue is addressed or liquidation preferences of existing preferred stock are significantly reduced to reflect TechCo's economic condition at the time of the new investment. If it is clear that TechCo will be sold near term, it is wise for the investor putting in new money to force the clean up the overhang of liquidation preferences at the time of its investment, rather than waiting for the acquirer to put an offer on the table and fighting the issue out then.

When TechCo is Near Bankruptcy

Insolvency. A company is insolvent if it cannot pay its undisputed debts as they come due or if its debts exceed the fair value of its assets. If TechCo is near insolvency when it decides to be acquired and the deal price paid won't fully satisfy TechCo's creditors, LargeCo and TechCo's board of directors will want to protect themselves from claims by TechCo's creditors and shareholders. TechCo's board has an obligation to make sure it receives reasonably equivalent value for its assets, and LargeCo seeks to avoid successor liability.

Cash Asset Purchases Typical. In such a case, LargeCo will generally want to acquire TechCo's assets for cash, not do a stock for stock merger with TechCo. In a merger, LargeCo, or its subsidiary, assume all of the obligations and debts of TechCo by operation of law - to be avoided in these circumstances where the purchased assets are worth less then TechCo's liabilities. In an asset purchase, LargeCo can select the TechCo assets that it wants to buy and generally avoid unrelated TechCo liabilities. A cash asset purchase provides TechCo with the means to pay its creditors after LargeCo acquires the desired assets. LargeCo's stock is not a desirable acquisition currency in such circumstances because it will have to be resold for cash before creditors can be paid.

Successor Liability. Even in an asset acquisition, LargeCo might be liable for TechCo's obligations under a "successor in interest" theory. This can happen if there is an express or implied assumption of the obligation, if no value is paid to the creditors in the acquisition, if the purchaser is a mere continuation of the target, the transaction was fraudulently arranged to escape debts or for products liability claims against the prior business, where the pre-existing business is continued without interruption. In addition, certain types of statutory liability (such as unpaid California sales tax) will follow the purchased assets into LargeCo's hands.

There follows a table and summary of major considerations when acquiring a company near bankruptcy:

Table 7: Acquisition Alternatives When TechCo Near Bankruptcy

Characteristic	Asset Sale	Pre Negotiated Bankruptcy	Wait and Shop at Bankruptcy	Assignment for Benefit of Creditors
Summary	Best if target assets value less than debts & few or manageable creditors	Best if large or aggressive creditors & assets critical at fair price	Best if target price unrealistic or uncertain; target files bankruptcy; bid if fair price	Notify creditors and potential buyers; sell assets to liquidator. Cheaper/faster than bankruptcy
Private/Public?	Private	Private agreement; Public auction	Public	Semi Private
Shareholder Approval Required?	Yes	No	No	Yes
Access to Diligence?	Yes	Yes	Limited	Yes
Control of Process?	Most Control	Some over bid terms, asset lots, bidding increments	Little to none	Considerable control

Deal Cost?	Least	Most	Second Most	Moderate
Time to Closing?	Fastest	Slowest	Second Slowest	Second fastest
Risk to IP Rights?	Assignability? No IP bankruptcy effect	Licensor approval needed for transfer of inbound IP rights	Licensor approval needed for transfer of inbound IP rights	May trigger termination of IP rights
Risk to Unpaid Creditors?	Yes, unless get waivers/releases	Sale free of liens and creditor claims	Sale free of liens and creditor claims	No bar, but some defense

Private Asset Sale. When TechCo is a small privately-held company, with a modest number of creditors, LargeCo will typically do a private asset acquisition outside of bankruptcy. In this scenario, TechCo's secured creditors will have to be satisfied (either through full payment or partial payment and release) to remove liens from the purchased assets. Failure to get the liens removed will mean that LargeCo acquires the assets subject to those liens. TechCo's CEO may also want TechCo's unsecured creditors to release TechCo, its board and LargeCo from liability if creditors receive an agreed-upon payment at closing. The argument is that TechCo will be shut down if TechCo's assets are not sold, leaving little or nothing for the unsecured creditors, so the creditor's choice is to receive a nominal distribution in the acquisition or nothing. The asset purchase agreement may require that the purchase price be delivered by sending checks directly to the creditors at closing in exchange for such releases. The releases are critical to LargeCo, TechCo and TechCo's board of directors. Releases protect the parties from an assertion that the transaction is a fraudulent transfer or that TechCo's board of directors breached its fiduciary duty to its creditors. While TechCo may not be able to obtain releases from all creditors, LargeCo may not want to close the deal if TechCo does not obtain them from the largest/most vocal unsecured creditors, who may have the economic incentive to attack the transaction to obtain payment. If the unassumed liabilities are small or widely dispersed over TechCo's unsecured creditor body, LargeCo may take the risk that it will not be sued after the closing and forego the releases.

Pre-Negotiated Bankruptcy with LargeCo As Lead Bidder At Auction. If it is clear that TechCo is headed into bankruptcy, the dollars are too great to risk or the creditors too many to negotiate with, LargeCo will acquire TechCo through the bankruptcy process. The most common approach is to have the parties negotiate a purchase agreement with a closing condition that the sale will be completed through bankruptcy. TechCo then files for Chapter 11 bankruptcy, asking the court to declare LargeCo the "lead bidder" and setting procedures for bidding deadlines, overbid limits, etc. and confirming any available protection for LargeCo, such as a requested break-up fee if it is overbid. An auction and sales hearing are then held where third parties can come in and bid against LargeCo for the assets. Filing bankruptcy automatically stays any lawsuits or collection actions against TechCo. If LargeCo wins the auction, it will be difficult for TechCo's creditors to challenge the transaction and the sale will be free and clear of named liens or interests that encumbered TechCo's property. No shareholder approval is required in this process and therefore there is no proxy statement requirement or delay for SEC review. As the lead bidder, LargeCo gets to frame the major issues of the auction, subject to court approval: the division of assets and lots, bidding increments, deposits, etc. On the other hand, once TechCo is in bankruptcy, LargeCo loses control of the process. As the process itself is public and creditors and shareholders get to object to aspects of the process or proposed sale, LargeCo could get bogged down in fights over technicalities or could be outbid (or have its bid rejected). The auction and deal terms will, of course, be public. In addition, TechCo's bankruptcy may impair inbound IP rights that were critical to LargeCo. Cash is the typical currency in these transactions. If LargeCo wants to use stock, it will have to be registered immediately after the closing, because creditors will obstruct purchases with

private stock, which cannot easily be valued and then liquidated pay their claims. Further, TechCo has to worry about the consequences of a failed sale: employees, suppliers, business partners and other suitors will view TechCo less favorably once it files for bankruptcy, and TechCo is unlikely to be able to terminate its bankruptcy filing once it is in Chapter 11.

Wait and Shop. Another approach would be for LargeCo to wait for TechCo to declare bankruptcy and bid at the auction without going to the expense and effort of negotiating the purchase agreement. It permits LargeCo to get a "market" check on the value of TechCo's assets so it won't be overpaying. Even if LargeCo is not the "lead bidder," if LargeCo wins the auction, TechCo's creditors can't easily challenge the transaction and the sale will still be free and clear of named liens or interests that encumbered TechCo's property. No shareholder approval is required and therefore there is no proxy statement requirement. On the other hand, LargeCo won't have the same due diligence access that it could have if it negotiated the purchase agreement. It also won't be able to divide the asset lots as it wishes, so it may have to acquire assets it doesn't want in the auction to obtain the assets it does want. Lastly, it will not be able to control the details of the auction - such as timing and mechanics of bidding. The benefits of being the "lead" bidder generally outweigh the detriments.

Assignment for Benefit of Creditors. If LargeCo wishes to avoid bankruptcy, it could use an assignment for the benefit of creditors (ABC). Procedures vary from state to state for an ABC. In California, a court proceeding is not required. The parties pick an assignee (usually a troubled company professional) and the assignee conducts an auction of the assets, reviews the claims of creditors, and collects and handles the distribution of proceeds to the creditors. It is cheaper, somewhat more private, faster than bankruptcy and leaves LargeCo in more control of the process. Using an ABC is not a bar to a fraudulent transfer claim, but having a professional handle the liquidation, especially if it occurs through an auction process with broad notice to creditors orchestrated by the assignee, supports TechCo's contention that reasonably equivalent consideration was paid. Note that an ABC may trigger termination clauses in key contracts (such as intellectual property licenses), which are not enforceable in bankruptcy. In an ABC, you don't have the automatic stay of lawsuits, ability to reject executory contracts or ability to sell free and clear of liens that you have in bankruptcy.

Implementing The Deal

Having considered the major deal issues involved in LargeCo's acquisition of TechCo, the following section outlines the process to get the parties from their handshake deal to a completed transaction.

Letter of Intent

A letter of intent (LOI) is a short document (3-5 pages) in which LargeCo outlines the key deal points of the proposed acquisition. The purpose of exchanging draft LOIs is to ensure agreement on the major issues before LargeCo and TechCo commit major resources to due diligence and detailed negotiations. The LOI typically outlines the proposed form of the transaction, as well as the details of the consideration to be paid. It also should include any proposed risk-reduction mechanisms, employment or non-competition provisions, brokers' fees and the tax, accounting and securities structures to be used. Except for confidentiality provisions, the no-shop clause and the need for each party to pay its own expenses, most LOIs are nonbinding. (See Appendix A for a sample Letter of Intent for a merger to be accomplished under a Form S-4 Registration Statement.)

Disclosure of Acquisitions

The federal securities laws impose certain obligations on a publicly traded company to disclose to the

market material facts that could be expected to affect the value of its securities. Whether an acquisition would be material to LargeCo depends on how important the acquisition is to LargeCo (given the importance of LargeCo's other operations) and how probable it is that the acquisition will occur. Acquisitions that represent 10% of LargeCo's stock, assets or revenues may be considered material. If the acquisition is material, LargeCo may be required to make a public announcement of the acquisition if:

- LargeCo is responsible for a market leak relating to the deal;
- LargeCo is trading in its own stock (*e.g.*, stock repurchases);
- LargeCo's insiders are trading in LargeCo stock; or
- LargeCo has recently denied that it was in merger negotiations.

Companies do not want to make premature announcements of a proposed acquisition. They prefer to announce only after they are certain that the acquisition will occur and they have had an opportunity to address the customer and employee questions that will arise because of a public disclosure. When negotiating an acquisition, it is incumbent upon the parties to institute internal controls to avoid creating a disclosure obligation. For example, LargeCo should maintain strict confidentiality to avoid leaks to the public about the negotiations and should have a policy of responding to press inquiries about merger negotiations with "no comment." As an additional precaution, many public LargeCos avoid executing LOIs. After exchanging unsigned drafts of the LOI, the parties may go directly to negotiating and executing the definitive agreements. Their position is that, absent a signed LOI, the acquisition first becomes probable when the parties execute the definitive agreements.

Time and Responsibility Schedule

Once the parties agree on the terms of the LOI, LargeCo generally will circulate a "time and responsibility schedule." The time and responsibility schedule outlines the items that need to be accomplished to complete the transaction, the parties responsible for each item and the date on which each item must be completed. Attached to the time and responsibility schedule is the "Interested Parties List," giving the name, address, office telephone, e-mail and fax numbers, and home address and telephone number of each party who might be needed on a time-critical basis during negotiations. These documents ensure that everyone has the same expectations regarding who is responsible for doing what and when it must be completed. (See Appendix B for a sample Time and Responsibility Schedule for a merger to be accomplished under a Form S-4 Registration Statement.)

Definitive Agreements

The next step in the acquisition process is for LargeCo to send out a "Due Diligence Request Check List," soliciting detailed information and documentation about TechCo. This begins the due diligence process in earnest. (See also "LargeCo Due Diligence" above.)

Simultaneously, LargeCo will prepare, and the parties will negotiate, the definitive agreements. The main agreement would be an "Agreement and Plan of Reorganization" if LargeCo is acquiring TechCo by a merger, an "Asset Purchase Agreement" if LargeCo is acquiring TechCo's assets, or a "Stock Purchase Agreement" if LargeCo is acquiring TechCo's stock directly from TechCo's shareholders. Each of these agreements will set forth in detail the

- terms of the acquisition,
- TechCo's representations and warranties (which will be very detailed),
- LargeCo's representations and warranties (which generally will be more limited than those made by TechCo),
- TechCo's covenants (generally relating to TechCo's conduct of its business between signing the agreement and closing),
- LargeCo's covenants (generally relating to taking the steps necessary to close the transaction),
- conditions to closing,
- termination provisions, and
- indemnity and escrow provisions.

To supplement its representations and warranties, TechCo will be required to deliver to LargeCo detailed schedules itemizing material TechCo property, assets and liabilities. TechCo will want to ensure that the schedules are complete and correct since TechCo's shareholders could be liable if they are not. (See also "TechCo Representations and Warranties, Indemnities and Escrows" above.)

TechCo also will want to focus on the conditions to closing contained in the agreement. "Conditions to closing" are things that must be true before LargeCo, TechCo or both parties are required to close the acquisition (*e.g.*, there must be no injunction outstanding prohibiting the acquisition). TechCo will want to avoid LargeCo conditions to closing that are subjective or within LargeCo's control. For example, TechCo would not want LargeCo to be able to refuse to close because it has determined that TechCo's prospects no longer look as promising as they did at the time it signed the definitive agreement. (See also "LargeCo Due Diligence" above.)

In addition to the principal agreement, the parties may negotiate and execute ancillary agreements, such as an Escrow Agreement, Employment Agreements, Noncompetition Agreements, a Registration Rights Agreement and Affiliates Agreements.

Board Approval

TechCo's Board of Directors must approve the definitive agreements before they are signed. LargeCo's Board of Directors should approve the acquisition if it is material or outside its ordinary course of business. A Board of Directors has a fiduciary obligation to try to negotiate the best deal for its shareholders. The law allows the Board to exercise its business judgment when evaluating competing offers, but requires it to exercise due diligence in the process. To meet this requirement, the Board should thoroughly review and discuss the proposed terms of the acquisition and the results of management's due diligence investigation. The Board also may want to consult an investment banker regarding the "fairness" of the proposed transaction to the shareholders. If valuation is an issue, the Board may even want an investment banker to "shop the company." The parties should be aware that if they obtain a "fairness opinion" from an investment banker, the SEC (when reviewing an S-4 Registration Statement) or Federal Trade Commission (FTC) (when reviewing a Hart-Scott-Rodino filing) may require disclosure of documents shown to the investment bankers or the Board of Directors regarding the proposed merger.

Necessary Consents

Once they have signed definitive agreements, the parties must comply with legal, regulatory and contractual requirements in order to consummate the transaction. The following section outlines the typical governmental, shareholder and third-party consents necessary to accomplish an acquisition.

Securities Law Compliance Alternatives. If LargeCo plans to issue its stock in exchange for the stock or assets of TechCo, it either must register the shares issued under the Securities Act of 1933 (1933 Act) or find an applicable exemption. The three most common mechanisms used to comply with federal securities law requirements are for LargeCo to issue the shares in a private placement in reliance upon §4(2) of the 1933 Act; to register the transaction with the SEC on a Form S-4 Registration Statement; or go through a state fairness hearing and rely upon §3(a)(10) of the 1933 Act. ***The mechanism LargeCo chooses will have a major impact on transaction costs, the time it takes to consummate the transaction, and the type and timing of the liquidity TechCo's shareholders receive.***

The following table shows the matrix of possible securities law alternatives for acquisitions and their impact on these key business considerations:

Table 8: Securities Law Compliance Alternatives

Business Considerations	Private Placement	Form S-4 Registration Statement	Fairness Hearing
Transaction Costs	Least Expensive	Most Expensive	Modest Expense
Time to Closing	15-30 Days	90+ Days	30-60 Days
Liquidity Timing	Can be up to 1 year after closing	At Closing	At Closing
Shareholder Liquidity	Least Liquidity (1-year holding period)	Most Liquidity	Most Liquidity
If a public LargeCo issues more than 20% of its stock	Not Practical	Required	Not Practical

The following check list of the key securities law requirements is for purposes of identifying areas of concern only. Since these rules are dynamic and complex, you should consult your securities law advisor regarding the application of these requirements to your company and facts.

- *Private Placement.* If there are few TechCo shareholders who are all rich or sophisticated enough to meet the requirements of Regulation D or §4(2), then LargeCo may issue shares in a private placement. There is no regulatory review of private placement disclosure documents. Therefore, there are no time limits imposed on the process. LargeCos frequently prefer a private placement because it is the securities compliance alternative that enables LargeCo to complete the deal the most rapidly.
  - *Disadvantages of Using a Private Placement.* There are risks and drawbacks associated with doing a private placement. If LargeCo wants to qualify for the Regulation D safe harbor, it will need to verify that each TechCo shareholder, alone or with the help of an advisor, meets the required sophistication test. If any TechCo shareholders are not

accredited, LargeCo may need to prepare a more detailed (*i.e.*, costly) proxy statement than it would need for a fairness hearing. The biggest drawback to a private placement, however, is that TechCo's shareholders will receive "restricted securities." Accordingly, absent other actions by LargeCo, TechCo's shareholders would have to hold the shares for at least one year before they could be publicly sold. If LargeCo is a privately held company, TechCo's shareholders might be in no worse position than are LargeCo's shareholders. If LargeCo's stock is publicly traded, however, TechCo's shareholders will be disappointed to learn that they must hold their LargeCo stock for one year before it becomes publicly tradable.

- ***Registration Rights.*** To satisfy the desire of TechCo's shareholders for liquidity, a public LargeCo that proposes a private placement generally will offer registration rights in connection with the stock to be issued in the merger. Registration rights are an agreement by LargeCo giving TechCo's shareholders the right to require LargeCo to register their shares with the SEC, thereby making the shares tradable (demand rights). LargeCo also may give TechCo's shareholders the right to register their shares with the SEC if LargeCo decides to file its own registration statement (piggyback rights). LargeCo should pay expenses associated with both types of registration rights.

- ***Limited Liquidity Offered By Registration Rights.*** LargeCo typically will want to limit the period during which it must keep the registration statement effective. For example, it might only allow TechCo shareholders to publicly sell their LargeCo stock during 90 days within the one-year restricted period. Given the volatility of most high technology stock prices, such an offer may not meet the need of TechCo's shareholders for true liquidity. The better solution is for LargeCo to grant TechCo's shareholders S-3 "shelf" registration rights. Effectively, this requires LargeCo to keep the registration statement effective so that TechCo's shareholders may publicly resell their LargeCo shares throughout the one-year restricted period. LargeCos object to keeping registration statements effective for such a long period because it may impose greater public disclosure obligations on them. LargeCo may want to limit TechCo's shareholders to regular "trading windows" during each quarter to mitigate LargeCo's public disclosure concerns. One more caveat regarding these registration rights: The SEC has become hostile to companies making a private placement immediately followed by filing an S-3 resale registration statement on the shares issued in the private placement. LargeCo could receive detailed SEC review and comment on its registration statement and its 1934 Act filings, and TechCo's shareholders could experience delay in obtaining their desired
liquidity. Since technology stocks are highly-volatile, such delay could coincide with a drop in the market value of LargeCo's stock.

- ***Form S-4 Registration Statement.*** LargeCo also can register the stock to be issued to TechCo's shareholders with the SEC under a Form S-4 Registration Statement. Form S-4 can be used to register shares issued in a merger, a sale of assets followed by a liquidation, or an exchange offer. LargeCo may choose to register the shares with the SEC because neither a private placement nor a §3(a)(10) fairness hearing is available to LargeCo (see the discussion below). Also, if LargeCo is a public company and must obtain its shareholders' approval of the acquisition (*e.g.*, it is issuing 20% or more of its stock in the acquisition), it will need SEC approval of its proxy statement. In that event, LargeCo might as well register the transaction with the SEC since there would be no cost or timing benefits to doing a private placement or a fairness hearing.

    - ***Disadvantages of Using Form S-4.*** Using a Form S-4 Registration Statement is far more

costly and time-consuming than the other two securities compliance alternatives because LargeCo must comply with the SEC's proxy solicitation rules. A Form S-4 Registration Statement is a complex document that provides a detailed description of LargeCo (with the same detail required in a public offering) and TechCo (with much of the detail required in a public offering), the details of the proposed transaction, and financial statement disclosure, including pro forma financials for the combined companies. It is an order of magnitude more costly to prepare a Form S-4 Registration Statement and proxy statement than to prepare a Notice of Fairness Hearing or a proxy statement for a privately held company. As with any other public offering, there is a 30-day period after filing the registration statement with the SEC before the parties are likely to receive SEC comments and questions on the filing. The parties must satisfy each of those comments before they will be allowed to circulate the proxy statement to the LargeCo and TechCo shareholders for their consideration of the transaction.

- ***Freely Tradable LargeCo Stock.*** The principal advantage of using a Form S-4 Registration Statement is that TechCo's shareholders receive LargeCo shares that, for securities law purposes, are immediately tradable in the public market. (See, however, the discussion on other "Post-Closing Restrictions on Liquidity" below.) Shares issued to TechCo nonaffiliates may be freely resold after the closing of the acquisition. Shares issued to TechCo affiliates may be freely resold under Rule 145(d) in "brokers' transactions" while there is public information available about LargeCo and the shareholders comply with the volume restrictions of Rule 144.

- ***Fairness Hearing.*** §3(a)(10) exempts from registration securities issued in exchange for securities, claims or property where the terms of the exchange are approved, after a hearing regarding the fairness of such terms, by any governmental authority expressly authorized to grant such approval. Five states (California, Idaho, North Carolina, Ohio and Oregon) have adopted provisions whereby a state government agency will, at the request of the parties, hold a "fairness hearing" to determine that the terms of the transaction are "fair, just and equitable." The following discussion outlines the California process for obtaining a fairness hearing.

  - ***Availability.*** To be eligible for a fairness hearing, LargeCo must demonstrate that LargeCo or some of TechCo's security holders are resident in the state where the fairness hearing is to be held. LargeCo also will need to comply with the Commissioner of Corporations' standards of "shareholder democracy." For example, unless LargeCo is a Nasdaq National Market or NYSE company, California will not allow a fairness hearing if LargeCo has a "poison pill," and may be concerned if LargeCo's charter documents prevent shareholders from removing directors without cause or do not allow shareholders to call special shareholders' meetings. ***The SEC has confirmed that both private and listed companies which rely on fairness hearings qualify for the §3(a)(10) exemption.***

  - ***Timing.*** The parties must file a permit application with the Department of Corporations requesting a fairness hearing. When the request is granted, the fairness hearing is held between 10 to 30 days after a "notice of fairness hearing" is sent to all interested security holders. The notice period typically will be 10 days if all security holders are resident in California; 20 days if all security holders are resident in the United States; and 30 days if some security holders are non-U.S. residents. Typically, a principal from each of LargeCo and TechCo will appear at the hearing with their respective counsel and testify about the terms and fairness of the acquisition. If the Commissioner of Corporations grants a permit to LargeCo after a fairness hearing, the transaction will be exempt under §3(a)(10).

- ***Liquidity Advantages Over a Private Placement.*** If a fairness hearing is available, it offers significant liquidity advantages over a private placement. While a private placement can be closed more quickly than a transaction subject to a fairness hearing, in a private placement TechCo's shareholders receive "restricted stock," which is not freely tradable. By contrast, shares issued in a fairness hearing transaction are as freely tradable as those issued under a Form S-4 Registration Statement. Also, even if LargeCo agrees to immediately register the shares in the private placement with the SEC, that can take from 15 to 60 days (or more) to accomplish. If available, the fairness hearing gives TechCo's shareholders a faster path to greater liquidity than a private placement.

- ***Cost and Timing Advantages Over a Form S-4 Registration Statement.*** For a public LargeCo acquiring a private TechCo in a transaction that is not subject to the SEC's proxy solicitation rules, a fairness hearing also offers significant cost and timing advantages over using a Form S-4 Registration Statement. While the stock issued in a fairness hearing transaction is resaleable in the same manner as stock issued under a Form S-4 Registration Statement, the filing of a Form S-4 Registration Statement with the SEC is far more complex, costly and time-consuming. A typical merger done under a fairness hearing can be accomplished in 30 to 60 days, and legal costs on LargeCo's side can range between \$50,000 to \$100,000 or more. A typical merger done under a Form S-4 Registration Statement will take more than 90 days and the legal costs on LargeCo's side probably will exceed \$250,000. A Form S-4 Registration Statement is more certain, however. Unlike the Commissioner of Corporations, the SEC does not have the option of refusing to register the shares on fairness grounds.

- ***State Blue Sky Laws.*** LargeCo also will need to review state securities (blue sky) laws where it or any of TechCo's shareholders are resident to determine if the transaction must be qualified or if an exemption is available. Many states have specific exemptions that apply to merger and sale of assets transactions subject to shareholder vote. All states have exemptions for shares listed on the New York Stock Exchange, American Stock Exchange or the Nasdaq National Market.

- ***Employee Stock Plans.*** If a public LargeCo is assuming TechCo's stock option plan in the acquisition, it will need to file an S-8 Registration Statement with the SEC. This is necessary to enable TechCo's former employees, following the effectiveness of the acquisition, to purchase registered LargeCo stock. Preparing and filing the S-8 Registration Statement is simple and inexpensive.

Antitrust Approvals. LargeCo must verify if it is required to make a pre-merger filing with the FTC and Department of Justice (DoJ) under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This filing generally is required if LargeCo has assets or annual net sales of at least \$100 million, TechCo has more than \$10 million of assets or sales, and LargeCo is paying more than \$50 million for TechCo. However, if a transaction exceeds \$200 million, then the \$100 million/ \$10 million "size of person" test will not apply. LargeCo must pay a \$45,000 filing fee to the FTC with its filing if the deal size is below \$100 million, \$125,000 if the deal size is at or above \$100 million but below \$500 million and \$280,000 if the deal size is \$500 million or above. The parties must wait 30 days after the filing before they can legally close. During that period, the FTC or DoJ will determine if the proposed acquisition is likely to be anticompetitive. LargeCo and TechCo must maintain their independent operations during the waiting period. Either the FTC or DoJ can request additional information if it concludes, based on the first submission, that the acquisition may be anticompetitive. If there is a "second request," the closing may be

substantially delayed, TechCo may be required to divest itself of certain assets to obtain FTC or DoJ approval of the acquisition or approval may be denied.

Shareholder Approvals. To have an enforceable agreement, the parties must obtain the necessary shareholder approvals of the acquisition before the closing. The parties must solicit such approval in compliance with state and federal securities and corporate laws.

- ***TechCo Shareholder Approval.*** TechCo's shareholders must approve an asset acquisition or a merger with LargeCo. Under most state laws, the approval of a majority of TechCo's outstanding shares will be required to approve the transaction. Under California law, if there are both common stock and preferred stock outstanding, TechCo generally will need to obtain the approval of a majority of each class of stock, voting separately. Legal counsel should review TechCo's state law and charter documents to verify whether some different or supermajority vote is required to approve the acquisition.

- ***LargeCo Shareholder Approval.*** LargeCo's shareholders may have to approve the acquisition if LargeCo issues a substantial amount of its stock in the acquisition. For example, the Nasdaq National Market rules require LargeCo to obtain its shareholders' approval when the number of shares it will issue is equal to or greater than 20% of its outstanding stock before the acquisition. Legal counsel should review LargeCo's state law and charter documents to verify the vote required to approve the acquisition.

- ***Shareholder Proxy Statements.*** If shareholder approval is required, the company seeking shareholder approval must produce a proxy statement describing the two companies and the terms of the acquisition. If a public LargeCo is relying on a private placement or fairness hearing exemption, it generally can provide most of the information about itself by attaching its most recent Form 10-K, Form 10-Qs and proxy statement. The description of TechCo can be short and simple when there are few TechCo shareholders and all are involved in Tech Co's management. When TechCo has shareholders not involved in managing TechCo's business, the description of TechCo should be more complete. If the parties are relying on the Regulation D safe harbor exemption or are preparing a public company proxy statement, the information required is set forth in the SEC's regulations, and the proxy statement will be voluminous and costly to prepare.

- ***TechCo Appraisal or Dissenters Rights.*** Under most states' corporation laws, shareholders who vote against a merger and meet specified requirements are entitled to have their shares appraised. Instead of receiving the negotiated consideration set forth in the acquisition agreement, such "dissenting shareholders" can receive the appraised value of their shares in cash. These rules vary from state to state, and shareholders must strictly comply with the rules to obtain their benefits.

Third-Party Consents. TechCo will need to verify whether the acquisition with LargeCo will breach any agreement to which TechCo is a party. TechCo should then obtain any required consents before closing. Agreements that typically prohibit mergers or acquisitions or treat them as a breach of contract include real estate leases, loan agreements, equipment leases and key license agreements. (See also discussion under "Tax-Free Acquisition - Reverse Triangular Merger.")

The Closing. Once the parties have met the legal formalities described above, the closing of the acquisition typically is a simple process. The parties meet briefly to exchange signature pages, provide legal opinions, and verify that the conditions to closing have been met. Champagne is optional.

Post-Closing Restrictions on Liquidity. After the closing, the parties need to remember that the following provisions may continue to restrict the shareholders' ability to resell their LargeCo stock:

- ***Tax Continuity of Interest Rules.*** In a tax-free acquisition, TechCo's shareholders cannot resell the shares issued in the transaction to LargeCo.

- ***Rule 145 Resale Restrictions.*** For one year after the closing, TechCo's affiliates must sell their LargeCo stock under Rule 145. Rule 145 requires that such shareholders sell their stock in unsolicited brokers' transactions, while LargeCo information is available and subject to Rule 144 volume limitations.

- ***Rule 16(b) Purchase.*** Unless specific Board of Directors approval is obtained, the merger will be treated as a "purchase" for Section 16(b) purposes for any TechCo affiliates negotiating the acquisition who become officers, directors and 10% shareholders of a public LargeCo. Therefore, such affiliates should not sell their LargeCo stock until they have held it for more than six months after the closing. An earlier sale can subject them to returning any profit on the sale (the difference between the sale price and the price of LargeCo's stock on the closing date) to LargeCo under Section 16(b) of the 1934 Act.

Integration Issues

The greatest source of TechCo value results from its financial performance and joint economics in the hands of LargeCo. For that value to materialize, LargeCo must successfully integrate TechCo's personnel, technologies and products into its own operations. The ideal is for LargeCo to retain those aspects of TechCo's corporate culture and business processes that added to its competitive advantage, while bolstering TechCo's weaknesses with LargeCo's strengths. Since each company has different strengths and weaknesses, there can be no single approach to successful integration. LargeCo will need to tailor an integration plan based on its strategic reasons for having acquired TechCo and TechCo's unique strengths and weaknesses.

There are a few useful generalizations about the integration process. During due diligence, LargeCo should determine which things TechCo does uniquely well. As it begins integration, LargeCo should communicate to its own staff that those particular TechCo areas should not be interfered with or changed. During the early months, LargeCo needs to clearly communicate to TechCo's personnel the reasons why it views TechCo as valuable and why the merger will benefit TechCo. If possible, it is preferable to bond TechCo's personnel to LargeCo's organization without major changes to TechCo's organization and reporting relationships. If changes are dictated, then they should be clearly communicated to all TechCo employees, along with the reasons and intended benefits. Rumors abound during an acquisition and can only be counteracted by clear and frequent LargeCo communications. Only by creating a vision of shared objectives and benefits can LargeCo replace TechCo rumors and employee turmoil with the financial performance and joint economics that were the basis of LargeCo's decision to acquire TechCo.

Conclusion

The statistics indicate that TechCo is more likely to be acquired than it is to go public. Given that reality, TechCo should invest the time to identify LargeCos that are the best candidates to meet TechCo's strategic needs. It also should identify the strategic objectives of those LargeCos and keep that data in mind during its business planning process. It is one filter to determine whether TechCo's

business decisions will expand or limit its value and exit opportunities. If acquisition remains the most probable exit strategy as TechCo grows, it might consider partnering arrangements instead of capital-intensive expansion of its infrastructure.

If TechCo decides to enter into merger negotiations, it should involve its investment banking, legal and accounting advisors early. They can help TechCo focus on what issues are critical to it, its Board of Directors, its shareholders and its employees. Knowing TechCo's key issues at the beginning of the process increases the probability of meeting their needs. Planning for, negotiating and closing the acquisition of TechCo will be one of the most intense and challenging experiences of your professional life. Accomplishing an acquisition that meets the objectives of all of TechCo's constituencies can be one of the most rewarding.

APPENDIX A:

Letter of Intent

Dear TechCo CEO:
The purpose of this letter is to further our discussions concerning the possible merger of TechCo with and into LargeCo. We would like you to consider and respond to the following proposal, which is not intended to be a binding offer and is contingent on the completion of our due diligence, but will serve as a basis for further discussions and negotiations.

1. Merger. TechCo will be merged into LargeCo, or with a wholly-owned subsidiary of LargeCo, in a statutory merger.

2. Consideration. LargeCo will issue to the shareholders of TechCo the number of shares of LargeCo common stock calculated below at the closing. We understand that there are currently outstanding ____ shares of TechCo common stock, ____ shares of TechCo preferred stock, options to purchase ____ shares of TechCo common stock and that there will be no material change in the outstanding capitalization before closing. If the closing price of LargeCo's common stock for the five trading days ending two trading days before the effective date of the merger (the "Average Price") is equal to or greater than $___ per share and less than or equal to $____ per share, the TechCo security holders will receive an aggregate of ______ shares of LargeCo common stock. If the Average Price is equal to or greater than $____ and less than $______ per share, the TechCo security holders will receive that number of shares of LargeCo Common Stock determined by dividing $_______ by the Average Price. If the Average Price is greater than $_____ and less than or equal to $_____ per share, then the TechCo security holders will receive that number of shares of LargeCo Common Stock determined by dividing $______ by the Average Price.

3. Options. Outstanding options to purchase shares of TechCo common stock will be converted into options to purchase LargeCo common stock at the same exchange ratio as the TechCo common stock, with the exercise price being proportionately adjusted. LargeCo will register such shares on a Form S-8 promptly after the Merger.

4. Tax and Accounting Consequences. The merger will be structured to be tax-free for federal income tax purposes and as a purchase for accounting purposes.

5. Due Diligence. LargeCo and its attorneys, accountants and other representatives will have full access to the books, records and technology of TechCo to complete its due diligence investigation of TechCo and TechCo's technology before execution of the definitive merger agreements.

6. Representations and Warranties; Indemnity; Escrow. In the definitive agreement, LargeCo and TechCo will make customary representations and warranties to each other. Any damages arising out of a breach of TechCo's representations and warranties can be deducted from the escrow. The representations and warranties of LargeCo will terminate at closing. TechCo's shareholders will indemnify LargeCo against any losses, damages or expenses arising from or related to any breach of representations or warranties or any lawsuits. To secure such shareholders' indemnification obligations, ____% of the shares issued by LargeCo to TechCo shareholders will be escrowed until the publication of LargeCo's financial results for the year ended ____, 2____, as an escrow fund to cover any breaches of representations and warranties by TechCo. The indemnity shall not apply unless and until the aggregate of damages sought exceeds $_____ (inclusive of legal fees), in which event the indemnity shall include all claims for damages.

7. Form S-4 Registration Statement. The shares issued in the merger will be registered with the Securities and Exchange Commission on a Form S-4 Registration Statement. As a result, all shares of LargeCo common stock issued in the merger should be freely tradable subject to the volume limitations imposed by Rule 145(d) of the SEC on former affiliates of TechCo.

8. Shareholder Approval. The merger will be subject to approval by TechCo's and LargeCo's shareholders. At the time of execution of the definitive merger agreement, TechCo's and LargeCo's affiliates will agree to vote in favor of the merger. It will be a condition of the merger that no more than ___% of the shares of TechCo may dissent from the merger.

9. Employment/Noncompetition Agreements. __________ and ________ will execute Employment/Noncompetition Agreements with LargeCo.

10. Employee Matters. LargeCo anticipates that it will consolidate TechCo's finance and operations functions in LargeCo's __________ office. As a result, some TechCo employees whose functions are repetitive may be terminated and some TechCo employees will be asked to relocate to LargeCo's __________ office. TechCo employees who are not offered employment with LargeCo shall receive transition packages.

11. Conditions to Closing. The closing of the merger will be subject to customary closing conditions, including approval by the requisite percentage of TechCo shareholders, the absence of any breach of any representations and warranties, the absence of material undisclosed liabilities, compliance with applicable securities and other laws, the absence of material adverse changes in the financial or business condition or liabilities of TechCo, and receipt of appropriate corporate and tax legal opinions from counsel for TechCo and LargeCo. It also will be a condition to closing the merger that there be no material changes in TechCo's capital structure, royalty, salary or bonus plans before the closing, that TechCo's material agreements are not adversely affected by the proposed merger, and that TechCo use its best efforts to retain its key employees.

12. Continuation of Business. From the date of this letter of intent until the expiration of the Exclusive Period, TechCo will continue to operate its business in the ordinary course and will not enter into any transaction or agreement or take any action out of the ordinary course, including any transaction or commitment greater than $_______ (other than end-user license agreements pursuant to TechCo's standard end-user license agreement), any declaration of dividends, grants of new stock options or issuance of new shares of stock or rights thereto without first notifying LargeCo. TechCo will not terminate any employees without consulting with LargeCo.

13. Closing. It is anticipated that the definitive agreements will be executed by _________, 2____, and

that the merger will be consummated by _________, 2____.

14. Exclusive Period of Negotiation. Upon the signing of this letter of intent, the parties will enter into good faith negotiations to execute definitive agreements consistent with the terms and conditions of this letter on or before _________, 2____. Accordingly, TechCo agrees that, after signing this letter and until ___________, 2____ (the "Exclusive Period"), TechCo will not, and will not permit its officers, directors, employees, agents or representatives to, solicit, encourage, initiate, enter into, continue or participate in any negotiations or discussions with or provide any information to any third party concerning the possible acquisition or sale of TechCo or its stock, business or assets or any other transaction that would be inconsistent with the merger contemplated by this letter.

15. Disclosure. LargeCo will issue a press release upon signing the definitive agreement. LargeCo and TechCo agree to take all reasonable precautions to prevent any trading in LargeCo securities by their respective officers, directors, employees and agents having knowledge of the proposed merger until the proposed merger has been sufficiently publicly disclosed. The parties understand and agree that until the press release is issued, neither party will disclose the fact that these negotiations are taking place, except to professional advisors and to employees of LargeCo and TechCo on a need-to-know basis.

16. Professional Fees. Each party will pay the fees of its own accountants, attorneys, investment advisors and other professionals. If the merger is consummated, at the closing, LargeCo will pay the reasonable fees and expenses of TechCo's investment bankers, accountants and attorneys incurred in the merger, not to exceed a combined total of $____.

17. Confidentiality. The parties have entered into a confidentiality agreement dated ______, 2____, concerning the protection of the confidential information of the other party received during the negotiations contemplated by this letter, and each party hereby reaffirms such obligations.

18. Nature of Negotiations. The parties understand that the negotiations described in this letter are merely preliminary merger negotiations. This letter does not constitute a binding proposal or offer by LargeCo or TechCo. Any such proposal or offer, if made, will be subject to execution of definitive agreements containing conditions, including but not limited to those referenced in this letter.

19. Effect of this Letter. Except for paragraphs 14 through 20 of this letter, which create binding obligations of LargeCo and TechCo as indicated, this letter creates no liability or obligation on the part of either TechCo or LargeCo. Neither party will have any obligation to consummate the transactions contemplated by this letter unless and until definitive agreements concerning the proposed transaction are executed by both parties and the conditions set forth in the definitive agreement are satisfied.

20. Remedies. In the event of a breach of this letter agreement by either party, the other party may be entitled to any remedy for such breach available at law or equity.

We at LargeCo are enthusiastic about a business combination with TechCo and look forward to working with you. If this letter accurately sets forth our understanding, please sign and return a copy to me so that we may continue our remaining negotiations.

Very truly yours,	Agreed:
LargeCo	TechCo
By:	By:

Appendix B:

S-4 Merger Time and Responsibility Schedule

Days	Task	Responsible Party
1	Execute Mutual Nondisclosure Agreement and commence negotiations of Exchange Ratio/Deal Terms	LC/TC
15	Tentative Agreement subject to Due Diligence	LL
15-29	Mutual Due Diligence	LC/TC
18	Circulate Draft Merger Agreements	TL
24	Circulate Second Draft Merger Agreements	LL
29	LC Board Meeting (Obtain LIB Fairness Opinion)	LC/LL
29	TC Board Meeting (Obtain TIB Fairness Opinion)	TC/TL
30	Execute Merger Documents	ALL
30	Issue Press Release Prior to Opening of Market or After Close of Market	LC/TC
32	Circulate First Draft of Form S-4	LL
38	Circulate Second Draft of Form S-4	LL
41	File Form S-4 with SEC; Make HSR Filing with FTC/DOJ	LL/TL
41	WARNA Notice (if RIF>50 and 1/3 of site's employees) (notice date assumes that RIF occurs at or after close)	LL/LC
43	Search Date to Brokers (Rule 14a-13)	LC/TC
54	Notify NASD/Transfer Agents of Record Date	ALL
72	Receive SEC S-4 Comments	LL
72	HSR waiting period expires (if no second request)	
79	Amend Form S-4 to respond to SEC comments	LL
84	Record Date	
84	Amend Form S-4 to go effective	LL
90	Notice LC/TC stockholder meetings; mail prospectus/proxy statement to LC/TC stockholders, SEC and Nasdaq Stock Market	LL/TL
90	Execute LC/TC Affiliates Agreements	ALL
105	File Nasdaq Stock Market Notification Form for additional share issuance	LC/LL
120	TC/LC Stockholder Meetings	ALL
121	CLOSING; Issue Press Release	ALL
125	File Form 10-C (with Nasdaq only), Form 4s and Schedule 13Ds	LC/LL/TL
125	File Form S-8 to cover TC option plan	LC/LL

Participants:

LC = LargeCo
LL = LargeCo's Lawyers
LIB = LargeCo's Investment Bankers

TC = TechCo
TL = TechCo's Lawyers
TIB = TechCo's Investment Bankers

About the Author

Jacqueline A. Daunt is a corporate partner with the law firm of Fenwick & West LLP, and a co-chairman of the firm's Mergers and Acquisitions Practice Group. Her practice includes venture financings, mergers and acquisitions, partnering arrangements, distribution and licensing agreements and international protection of proprietary rights for high technology clients. Ms. Daunt received her B.A. in economics and her J.D. from the University of Michigan. She also attended the Université Libre de Bruxelles and L'Institut D'Etudes Européennes, where she studied comparative commercial law and European antitrust law. Ms. Daunt has authored a series of booklets on strategic issues for high technology companies, including *Venture Capital, Corporate Partnering, Structuring Effective Earnouts, International Distribution and Entering the U.S. Market* and is a frequent speaker on these topics.

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Letters of Intent: Beware of the Unintended

Arter & Hadden LLP
By David S. Lu

A letter of intent ("LOI") can serve a variety of purposes in any business transaction. However, LOI"s can contain pitfalls for the unwary. Too often business people enter into LOI"s with the attitude that they are not binding. Before signing an LOI in your haste to "lock in" a deal, beware of all consequences - legal and practical.

An LOI can facilitate progress in a deal by identifying key substantive issues and terms and providing the ground rules for reaching a definitive agreement and consummating the deal. Along these lines, LOI provisions are typically categorized into deal process terms that are binding and enforceable and substantive terms that are not. The LOI will typically state that it does not constitute a binding agreement, except for certain specific terms that are intended to be "legally binding and enforceable." Nonetheless, whether a term is actually binding or not, you need to anticipate and understand its impact on the outcome of a deal.

"Non-binding" topics in an LOI for a business acquisition may include descriptions of the basic transaction (what"s being sold, for what price, organizational structure), payment terms, side agreements to be entered into and other closing conditions, representations and warranties, and indemnification provisions. The LOI typically provides that these proposed terms will be finally addressed in the final negotiated agreement. These terms are uncertain at this stage because due diligence often has not yet started, much less been completed.

Of course, the extent to which you address any of the substantive topics depends on your position in the deal. For example, in an acquisition deal, a buyer may want to defer negotiations on specific deal points until it has more knowledge of the target assets through due diligence. On the other hand, a seller may want to resolve some important issues (such as setting limits on representations and warranties and indemnification) while it has greater bargaining power prior to entering into an LOI. Be careful that you do not psychologically commit yourself to a position. If you do incorporate any of these terms into the LOI, you should consider that these terms may be viewed by the other side as having been cast in stone in the context of contract negotiations.

Tax considerations are often overlooked at the LOI stage. For example, if you intend to have a tax-free

business reorganization, make sure that the proposed structure qualifies as such. If later it turns out that the transaction contemplated in the LOI does not qualify, this could fundamentally affect the economic terms of the deal, and could compromise your negotiating position.

The "binding" parts of the LOI typically include provisions regarding exclusive dealing, break-up fees, access for due diligence, confidentiality of deal terms and disclosed information, allocation of transaction costs, conduct of the business prior to closing and termination of the LOI. Avoid binding provisions that require "best efforts," "every reasonable effort" or "good faith" negotiations to finalize and execute a definitive agreement containing the terms set forth in the LOI. Courts could construe these provisions as agreements to reach an agreement, and could find a party liable for the reliance costs of the other party if a definitive agreement is not reached. In any event, some courts have held that even though the particular terms of an LOI are not enforceable, parties can create duties to bargain in good faith by entering into an LOI.

A primary goal of entering into an LOI is to get some assurance that the other side is serious about doing a deal with you. This is more important to the buyer of a business than a seller, who may want the flexibility to shop the business around. An LOI provision prohibiting the other side from soliciting or entertaining offers from, or negotiating with, third parties for a certain period of time will provide some comfort that you are not wasting resources pursuing the deal. Additionally, mostly in deals involving public companies or bankruptcy sales, an LOI could provide the payment of a "break-up" or "topping" fee if the exclusivity provisions are breached and, within a certain period of time, the other party consummates a similar deal with a third party.

Depending on the complexity of a proposed deal, a variety of issues can arise in negotiating an LOI. This article touches upon just a few of the common issues to be aware of. The more complex the deal, the more careful you have to be. In those cases, it would be prudent to seek counsel, ideally from a professional you would ultimately use to negotiate and implement the deal.

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Structuring International Acquisition Transactions Part II

Simpson Thacher & Bartlett
By Philip T. Ruegger III

III. D. Issues Involved When a U.S. Company Acquires a Foreign Company

1. General

When a U.S. company acquires a foreign public company, it must comply with the legal and regulatory scheme of the foreign nation. With much of the current U.S. cross-border merger activity taking place with European, Canadian and Japanese companies, this discussion will highlight some of the regulatory schemes and other legal issues that a U.S. company would have to comply with when acquiring an English, French, German, Canadian or Japanese company.

a. United Kingdom.

In the United Kingdom, all offers for listed and unlisted public companies are governed by the City Code, and the Takeover Panel is the administrative body responsible for administering the Code. The Code contains ten general principles regarding takeover conduct and procedure and a set of rules embodying these principles. Some of these principles include requiring that all shareholders of the same class be treated similarly; during an offer, all shareholders must be provided with the same information; shareholders must be given sufficient time to consider all relevant information; documents or advertisements in connection with the offering must be accurate; rights of control must be exercised in good faith; and directors must only consider the interests of shareholders, employees and creditors when advising the shareholders.[(1)] The City Code is not a statutory system enacted by the legislature, but is acknowledged by various U.K. self-regulatory bodies as playing a central role in the regulation of takeovers. For example, various securities professionals, including investment bankers and lawyers, are required by the self-regulatory bodies which govern them to observe the City Code. And, a court may view the Code"s prescribed conduct as determinative of what a jury may consider reasonable behavior and accordingly interpret the Code"s requirements as a matter of law.

Another issue specific to the United Kingdom is that the Takeover Panel can compel disclosure if there are rumors of a combination. The City Code requires that a bidder promptly make a brief public announcement of a possible offer when the target becomes subject to rumor or speculation following an

approach by the bidder. If the bidder has formed a firm intention to make an offer or circumstances occur such as rumor, speculation or an untoward movement in the target"s share price, the bidder must make a detailed announcement of the terms of the offer or of the possibility of the offer. The bidder is then required to mail an offer document within 28 days of such an announcement.

b. France.

In France, tender offers are regulated by the Commission des Operations de Bourse and the Conseil des Marches Financiers, both of which are statutorily created. The French rules apply to offers for those companies organized under French law and listed on the official market, the second market or the over-the-counter market of the French stock exchange. In addition to extensive regulation for takeovers, French law subjects the actual terms of takeover bids, including the price offered for the securities, to regulatory scrutiny. French rules provide for a twenty-day minimum offer period.

c. Germany.

The German Takeover Code is a hybrid between the United States" and the United Kingdom"s approaches to regulation. The German Code follows the United Kingdom"s model in that it is voluntary and self-regulatory, which enables a faster and more efficient reaction to changes in the legal and economic environment than a statutory regulation. The German Takeover Commission is comprised of appointed members from the financial community and can amend the Takeover Code whenever necessary. The German Takeover Code does not automatically apply to all takeovers. Rather, a party must provide an affirmative declaration that the party will comply with the Code. The German Takeover Code contemplates a minimum offer period of twenty-eight calendar days.

d. Canada.

In Canada, the existence of the Multijurisdictional Disclosure System (the "MJDS"), which the SEC adopted in 1991, has greatly facilitated cross-border merger transactions with U.S. companies. Under the MJDS, tender offers subject to the Williams Act made by Canadian and U.S. bidders for the securities of a Canadian issuer are deemed to comply with the Williams Act so long as applicable Canadian tender offer requirements are met and less than 40% of the subject securities are held by U.S. holders. All tender offers under the MJDS must be extended to all holders of the class of securities in the United States and Canada upon terms and conditions not less favorable than those offered to any other holder of the same class of securities. All provisions of the Williams Act apply to tender offers for securities of a Canadian issuer extended to U.S. shareholders that are not covered by Canadian law or that are covered by a blanket exemption from Canadian regulation. If limited Canadian exemptive relief is granted with respect to the tender offer, the SEC will determine how the Williams Act will be applied to the tender offer on a case-by-case basis. If a tender offer is ineligible for the MJDS because of a failure to meet the 40% test, the Williams Act generally will apply in addition to applicable Canadian regulations.

The normal form for effecting acquisitions of Canadian public companies, even in friendly transactions, is by tender offer. In Canada, an acquirer has 15 business days after on announcement of a tender offer to commence the offer and then must leave the offer open for at least 35 days. "Lock-ups" of large shareholders are very common. In the event that in excess of 90% of the shares of the Canadian target are acquired in the tender, the balance of the shares can be acquired in a "squeeze out" amalgamation.

Under anti-competition law affecting mergers in Canada, assuming the filing thresholds are met, the parties have a choice whether to make a filing with the Bureau of Competition Policy and observe a 21-

day waiting period or, alternatively, to apply for an advance ruling certificate. If granted, the certificate precludes subsequent challenge of the transaction but permits the Bureau the right to review the competitive impact of the transaction for a three-year period following completion of the transaction.

Under the Investment Canada Act ("ICA"), foreign acquisitions of Canadian businesses over certain monetary thresholds are reviewed. The stated purpose of the ICA is to encourage investment in Canada which contributes to economic growth and employment opportunities in Canada. As a result of the North American Free Trade Agreement, the thresholds for review are more liberal for U.S. acquiring companies, but remain unchanged in certain business sectors. In some acquisitions of Canadian companies by U.S. companies, in order to gain ICA approval, the acquirer may be required to make a commitment regarding jobs in Canada and growth of the business in Canada.

e. Japan.

In Japan, tender offers are governed by takeover bid rules which form a part of the Securities and Exchange Law of Japan. Under the takeover bid rules, any purchase of more than 5% of a listed company"s outstanding common shares from more than 10 shareholders or the purchase of more than 33 1/3% of a listed company"s outstanding common shares from less than 10 shareholders can be commenced following newspaper publication of the terms of the offer. The offer must be held open for at least 20, and not more than 60, days and must also be filed with the Ministry of Finance of Japan.[(2)]

These takeover bid rules historically have been used to effect negotiated transactions; hostile offers are a rarity in Japan. In addition, one Japanese practitioner has observed that takeover bids are often used to acquire weaker, struggling companies and at times the price of offers has been less than the then market price of the shares which were the target of the offer. In addition, in such takeover bids for weaker companies the bid price is not usually increased by the bidder, so the bidding dynamic common in the U.S. market in contests for corporate control has been lacking.

Mergers in Japan are also less commonly used as a means to effect acquisitions. The merger of any company whose liabilities are greater than its assets is not permitted. This can sometimes impede a foreign acquirer"s ability to merge an acquired company into an acquisition subsidiary. In such instances, if the acquired company has liabilities which exceed its assets, the acquirer must inject capital into the acquired company prior to effecting the merger.

One of the issues encountered by a U.S. acquirer wishing to effect an acquisition of a Japanese company is the creation of a Japanese acquisition vehicle. Unlike a Delaware (or other U.S. state) corporation which can be formed in a matter of hours, the formation of a Japanese corporate entity requires more time and forethought. The threshold issue in forming a Japanese acquisition company is to determine what form such an entity should take. Japanese law has two limited liability corporate entities, the *yugen kaisha* and the *kabushiki kaisha*. *Kabushiki kaisha* are the most common corporate forms used in Japan by large companies and are considered the closest analogue of a U.S. corporation. However, *kabushiki kaisha* have a significant initial capital requirement. On the other hand, the minimum initial capital required for a *yugen kaisha* is considerably less. Some Japanese practitioners caution that the use of a *yugen kaisha* by a foreign investors carries with it a certain stigma as this form is usually used by Japanese small business owners of gas stations, convenience stores and other small proprietorships, not by major corporations. The principal reason that foreign investors continue to use the *yugen kaisha* form despite the supposed stigma is that for U.S. tax purposes a *yugen kaisha* is allowed to "check the box" under the Internal Revenue Services"s "Check the Box" regulations to elect pass through tax treatment; a *kabushiki kaisha* cannot make such an election.

Once the foreign investor has chosen the form of corporate vehicle, the creation of the company requires about two weeks. Various registration procedures are required and the investor must use a Japanese bank to handle the subscription for the new shares (of a *kabushiki kaisha*) or units (of a *yugen kaisha*). In addition, either a Japanese lawyer or a judicial scrivener (a Japanese legal professional specializing in corporate registrations) is required to perform the formation procedures. Until the formation procedures have been completed, the acquisition vehicle is not able to sign agreements or acquire any shares or assets. Therefore, it is important to commence the procedures for forming a Japanese acquisition vehicle well in advance of the time that the vehicle will be needed.

Another issue encountered by a foreign investor using a newly formed acquisition vehicle to acquire stock or assets of a Japanese company is the *jigosetsurestsu* procedure. The Japanese Commercial Code requires that any time a Japanese company acquires assets which equal more than 5% of its paid-in capital within two years of its incorporation, the acquiring entity must apply to a Japanese court for the appointment of an appraiser to ensure that the price to be paid for the assets is fair and does not impair the capital of the newly formed company. Unfortunately, the fact that the price of the stock or assets to be acquired is the product of negotiations between independent parties is not sufficient to convince the appraiser that the price is fair. Rather, Japanese counsel often recommends that the acquirer hire an accounting firm or consultant to prepare a report showing that the price of the acquired property is fair. The sophistication of the court appointed appraiser and his or her willingness to accept U.S. financial valuation methods (such as discounted cash flow analysis) in making his or her determination varies. If the company is formed outside of Tokyo, then the ability of the local court and the court appointed inspectors to understand U.S. financial valuation methodologies and deal with English language documentation can be significantly lower. In addition, if the consideration for the acquisition is complicated (for example, involving an earnout), this can cause further uncertainty with respect to the procedure. Even in the Tokyo district court where the process is well understood and a body of experienced potential appraisers is available, the entire process can take 2-3 months, therefore imposing an effective waiting period on the closing of an acquisition. For this reason, the use of newly formed acquisition vehicles in Japan is often avoided by foreign acquirers.

f. Hostile Takeovers

As a general rule, corporate law in the United States is more tolerant of defensive measures than the corporate laws of most foreign countries. In the United Kingdom, for example, any actions taken by a target for the purpose of frustrating a hostile bid must be approved by the target"s shareholders. Moreover, the corporate laws of the United Kingdom require a shorter time frame in which to respond to an unsolicited bid. Therefore, persuading the shareholders to vote to block a hostile bid is more difficult.

Most of the other West European nations are more tolerant of defensive measures to hostile bids than the United Kingdom, but less so than the United States. The corporate law of France, for example, allows a corporation"s bylaws to limit the ability of a minority shareholder to vote. Germany"s corporate law is similar to that of the United Kingdom, but does allow the target to fulfill all contracts entered into before the hostile bid was made.

Notwithstanding the foregoing, cross-border hostile acquisition transactions are rare, and virtually non-existent in some countries, such as Japan. In part this is because a great deal of cooperation is required between the two companies in a cross-border transaction, particularly in satisfying the regulatory hurdles in the country of the target company. Without such cooperation, completing a transaction is usually difficult.

2. Tax

A U.S. acquirer of a foreign target may be interested in minimizing its foreign tax burden. One approach is to increase the leverage of the foreign target to generate interest deductions to shelter the income earned by the foreign target. A technique for increasing leverage is to form a subsidiary in the jurisdiction of the foreign target to borrow funds from the U.S. acquirer or a third party and then acquire the foreign target. The interest expense on the debt must be combined with the income of the foreign target through consolidation, merger or some other technique. Transactions to increase leverage raise issues concerning thin capitalization, withholding tax and general limitations on the deductibility of interest, as well as issues related to foreign currency gains or losses in the case of intercompany debt. Another technique for reducing the foreign tax burden that is available in some jurisdictions is to structure the transaction to provide the foreign target with a "step-up" in the basis of its assets and, therefore, increased depreciation or amortization expense. Obviously the availability of a deduction for interest and depreciation depends on the tax code for the particular country.

In addition, certain countries have specialized structures not available in the U.S. which can be utilized by a U.S. acquirer to reduce its foreign tax burden. For example, one popular form of financing among acquirers and other foreign investors in Japan is the use of a *tokumei kumiai* or silent partnership. A *tokumei kumiai* is a contractual relation between a company, which is the proprietor, and a silent partner which provides funding to the proprietor to allow the proprietor to conduct its business in return for a share of the profits of the business. The silent partnership is not an entity like a U.S. partnership and the assets of the proprietor, even if they are acquired with the money received from the silent partner, remain the property of the proprietor. The proprietor also conducts its business in its own name; there is no reference to any silent partner. Despite these distinctive features, the silent partnership is often considered similar to a U.S. limited partnership with the proprietor playing the role of the general partner and the silent partner as the analogue to a limited partner. Typically, an acquirer will capitalize its acquisition vehicle through the use of a silent partnership in which the acquisition vehicle will be the proprietor and the U.S. acquirer or one or more of its subsidiaries will be silent partners.

The key benefit of a silent partnership to the foreign investor is that the proprietor may deduct the amount of profit it distributes to any silent partner for purposes of its own corporate income tax. This means that any silent partner"s share of the proprietor"s income can avoid Japanese corporate level income tax, although depending on the jurisdiction of the silent partner and the number of silent partners, withholding or other taxes might still be payable on such distributions. If a silent partner is investing from a jurisdiction which has a favorable tax treaty with Japan (the Netherlands is a commonly used jurisdiction), then such foreign silent partner can receive distributions of profits from the proprietor without paying any Japanese taxes. In addition, a silent partnership is a limited liability arrangement in which creditors of the proprietor have no recourse against the silent partner.

From a U.S. tax perspective, a U.S. acquirer of a foreign target must consider its U.S. foreign tax credit position, including the allocation of interest expense to foreign source income and, in the case of a stock purchase, should consider making an election under section 338 of the Internal Revenue Code. A section 338 election allows a U.S. purchaser of stock in a foreign target to treat such stock acquisition as an asset acquisition and to "step up" the basis in the assets of the acquired foreign target (for purposes of depreciation and amortization). Whether such election is beneficial will depend upon the particular facts and circumstances of the companies involved.

3. Compensation and Employee Benefit Issues

In negotiating the acquisition of a foreign target, a U.S. acquirer must make a thorough analysis of

employee benefit considerations. Employee benefits provided by both the government and private employers vary widely from nation to nation. For example, contract law in the United Kingdom provides that employees may only be terminated after the running of agreed upon notice periods, absent just cause. Covered employees have a legal right not to be unfairly dismissed, and substantial compensation or a reemployment order is the remedy for infringement of such right. There are also laws regulating work force reductions ("redundancy") requiring union consultation and minimum redundancy pay for any employees who are laid off. There are also government-sponsored statutory sick pay and maternity pay plans. In addition, the government provides basic old age pensions and a state earnings-related pension plan. If the employer provides an occupational pension plan with benefits at least equal to the benefits employees would have received under the government plan, employers and employees may agree that employees" earnings are not subject to the government pension. Independent boards/trustees generally control such private plans. The ability to negotiate covenants altering the parties" obligations following the closing is more limited than in the U.S. All governmental requirements must be adhered to and the target does not have any authority to control the actions of the independent pension boards/trustees. For example, a covenant requiring a transfer of assets from any pension plan to another based on an agreed upon liability calculation method may well not be honored by the relevant pension board/trustee.

State regulation influences transactions in most other European Community member countries as well. Furthermore, union members and work councils have various, and sometimes quite significant, rights in most such countries, which must be factored into any acquisition.

4. Competition

Both the European Union and most countries have laws restricting acquisitions or mergers that would be anti-competitive. See E. Laws Regulating Anti-Competitive Combinations, below. In addition many countries have laws that restrict foreign ownership, particularly foreign ownership in certain industries such as banking or telecommunications.

5. "Golden Shares"

One obstacle to combinations in some industries in the United Kingdom and France is the existence of "golden shares." A golden share is a share of stock with special rights which is retained by the government after privatization. The rights conferred by golden shares and their duration vary from company to company and from country to country, but such shares frequently provide for governmental veto power in cases of fundamental changes to the issuer, including mergers. In the United Kingdom, for example, in connection with the privatization of British Aerospace, British Telecom and portions of the electric utility industry, golden shares were issued to the government. In France, the golden shares have been issued in connection with the activities linked to national defense (for example, the armaments industry), strategic resources (oil supplies), and national transportation and infrastructures (airlines and railroads).

6. Labor

The influence of worker"s councils in Europe are another issue that may arise in a cross-border transaction. Worker"s councils frequently have rights to information, consultation, and true participation in management decisions. Under these systems, labor representatives receive advance notice of management"s plans that would affect the workplace. The labor representatives then have the opportunity to consult and participate in management affairs that affect employment, including corporate mergers. The existence of worker"s councils and the significant rights conferred upon workers

often result in more time being focused on labor matters than is commonly the case in purely domestic business combination transactions. Moreover, in Germany and the Netherlands it may be necessary to obtain approval of the supervisory and the management boards before a transaction is allowed to proceed and the supervisory board usually includes a significant number of labor representatives and the supervisory board usually appoints the management board.

7. Due Diligence/Documentation

There is a substantial difference in the approach taken in investigating acquisition targets between U.S., British and Canadian ("U.S. style") legal advisors, on the one hand, and legal advisors for German, French, Spanish and other civil law countries, on the other hand. The U.S. style is to perform thorough due diligence on behalf of a client considering an acquisition. Typically, a U.S. acquirer will dispatch a team of attorneys and financial advisors to review the books, records, material contracts, etc. of the target in an attempt to analyze and understand the legal, contractual and regulatory issues and exposures and other issues surrounding the business it hopes to acquire. This U.S. style of due diligence is not customary in many civil law countries and can be a source of tension in a cross-border transaction involving a target in a civil law country.(3) In Japan, for example, the U.S. style might be viewed as an indication of mistrust. Legal advisors need to be sensitive to these different views in order not to behave in a way that undermines the goals of the client. In situations in which diligence has been limited, it may be appropriate to seek more in the way of representations, indemnities and even escrows from a foreign seller.

Similarly, the amount of documentation may vary among cultures. In parts of Asia, for example, a "deal" may occur with very little documentation, as long as there is a good relationship between the principals.(4)

8. Dispute Resolution

A common feature in a cross-border merger agreement is a clause in which the parties state that they will submit to one jurisdiction for the resolution of disputes arising out of the agreement - typically the jurisdiction of the target company - and they agree not to bring any action relating to the agreement in any court other than courts in that jurisdiction.

E. Laws Regulating Anti-Competitive Combinations

1. Introduction

Scores of countries(5) have "merger control" rules which empower national authorities to review mergers, acquisitions and other consolidations including, in certain circumstances, so-called "foreign-to-foreign" transactions. In addition, the European Commission (the "EC") passes on mergers for the European Union (the "EU"). The European Commission Merger Control Regulation (the "Merger Regulation") is based on provisions contained in the Treaty of Rome. Article 85 of the treaty prohibits collaboration that impedes the influence of effective competition in the common market, and Article 86 forbids the abuse of a dominant position. The EC can review any merger that meets its jurisdictional requirements -- the key factor being whether the merged entity would do enough business worldwide and in the EU to trigger EU jurisdiction under the Merger Regulation. This allows the EC to review mergers even if the two merging companies are not located in the EU. As long as the EC finds the merger has a "community dimension," it will determine if the merger is compatible with the common market, and, in extreme cases, may block the proposed union, order them to separate if they have already merged, impose fines, or compel a settlement. Although the ultimate legality of a proposed

transaction depends upon its competitive impact, in most jurisdictions the requirement to report or furnish notification regarding the transaction and, in most instances, wait for clearance before completing the transaction is triggered simply by a revenue or other financial threshold. As a result, transactions between large entities with a significant international presence, even a combination which does not raise significant competition issues, typically require the provision of notice in multiple jurisdictions. Providing notice of a transaction in a number of jurisdictions may have implications for the timing and, in some cases, the structure of a transaction.

2. Impact on Timing

As stated, most jurisdictions that require notification impose waiting periods, typically of one month for cases that do not raise substantive antitrust issues. In cases that do raise significant issues, there is usually a second phase of investigation that can extend the waiting period by a period of up to six months or longer. Waiting periods generally run from notification of the transaction to the merger control authority.

While the parties" initial concern typically is the cost and delay that an antitrust review may entail, the waiting periods may also impose severe time pressure on the parties. In the U.S., a Second Request for information from the FTC or the Antitrust Division of the Justice Department extends the waiting period under the Hart-Scott-Rodino Act until 20 days after the parties have substantially complied with the Second Request. That 20 days may be, and often is, extended voluntarily as the parties attempt to resolve any remaining differences with the reviewing agency.

In the EU, the situation is quite different. If the Merger Task Force opens a Phase II investigation after the one-month Phase I review, it must conclude its Phase II work (continuing its review of information from the parties, soliciting information from competitors, customers and suppliers, often issuing a Statement of Objections and conducting an oral hearing, negotiating remedies, if appropriate, and issuing a formal decision) within four additional months. There is no established mechanism to extend this period voluntarily. In a merger with significant competitive impact, this timing can impose a great deal of pressure on the parties and the Commission, especially where divestitures or other remedies must be structured and negotiated. It also frequently means that the EU will run ahead of the U.S. or other jurisdictions in reaching a resolution, which can have significant implications for choosing among divestiture options in a transaction with global competition issues.

The notification process itself can be burdensome, irrespective of the competitive implications of the transaction. For example, all EU filings require full country-by-country market share data by volume and value as well as detailed information about affected relevant markets -- forcing parties to make early decisions on how to define markets, often a complex issue in any merger analysis. On a more mundane level, translating key documents into the regulator"s language can be time-consuming, and is generally unavoidable.

In countries that have recently enacted merger control legislation,[(6)] there may be little institutional experience as to the appropriate economic analysis, the means for collecting information, or, more importantly, the way competition works in a number of industries. This has important consequences in terms of the extent of information that will have to be provided and may influence the order in which merger control authorities are approached. In the absence of institutional knowledge of an industry, considerable effort may be necessary to "educate" regulators about the nature and degree of competition in an industry to enable them to evaluate the transaction appropriately. Further, the relative inexperience of regulators can make it difficult to narrow the scope of information required, even on transactions that raise no genuine issues.

3. Impact on Structure

Although it is rare for deals to be structured around merger control issues, it may arise that a change to the structure of a transaction can have a dramatic impact on the regulatory horizon. Because the European Community Merger Regulation preempts national merger regulation and affords "one-stop shopping" to obtain merger clearance, structuring a transaction to reach the ECMR thresholds may be a desirable objective. Joint ventures are treated under the faster and more conclusive provisions of the EC Merger Regulation, so long as the joint venture arrangement is structured to lead to the integration of assets and a competitively autonomous entity. European joint ventures not so structured may be subject to the more protracted and less certain review entailed by Article 85 of the EC Treaty.

4. Strategic Considerations

Once filing requirements have been identified, there are often strategic considerations in the sequence in which merger filings are made. In cases raising significant issues, it may be advisable to file with the regulator that is least likely to object to the transaction. An approval in one jurisdiction often increases the likelihood that other regulators will not object.

In more straightforward situations, it may be advisable to prioritize filing in the country with the longest waiting period to minimize the delay. While most jurisdictions have a deadline requiring filing within a certain time after signing, in most, filing is also permissible prior to signing agreements, by using an advanced draft.

The merger control implications of a given transaction are most easily managed if the parties identify at an early stage the countries in which filing will be required. Filing requirements can be identified with reasonable certainty from the country-by-country sales data of each party in the last complete financial year, although market share data may be necessary in some jurisdictions to provide definitive information concerning international filing requirements. There are a number of benefits to early identification of filing requirements:

(i) The timing of a transaction can best be planned with full knowledge of the regulatory horizon;

(ii) If it is clear from an early stage in which jurisdictions the transaction will need to be filed, the parties have time to make strategic decisions about the order in which they will file; and

(iii) Early, pre-signing contact with regulators may be appropriate and desirable to allow for more time to develop a familiarity with an industry (and to waive some filing requirements).

F. Acquisition of a Foreign Company with Shares Listed in the United States - Application of Tender Offer Rules

When a tender or exchange offer is made to shareholders of a company with shares listed on stock exchanges in more than one country, the tender and exchange offer rules in each of the countries will most likely apply, thereby requiring compliance with multiple, and at times contradictory, sets of rules. For example, if an acquirer wants to buy a foreign company that has shares listed in the United States, the U.S. tender offer rules might conflict with those of the foreign country. These rules affect timing and disclosure obligations. There are also market-making rules from which relief must be obtained in some foreign countries. In the case of acquisitions of companies with shares listed in the U.K. and the U.S., there have been a sufficient number of these transactions so that the U.K. Takeover Panel and the SEC have positions on how to deal with cross-border tender offers. The same is true for companies

listed in Canada and the U.S. With regard to other nations" laws, however, there have not yet been enough cross-border transactions for the respective regulatory agencies to have developed positions on how to deal with them. These are not issues that should affect the ultimate outcome of the transaction; however, dealing with them does result in higher transaction costs for the merger.

In a tender offer for shares of a company listed on the London Stock Exchange and, through ADRs, on the New York Stock Exchange, several securities law conflicts arise. Under U.S. law, a bidder must allow for withdrawal of tendered shares until acceptance by the bidder of all tendered shares. Under the City Code in the United Kingdom, however, a tender offer must remain open for at least 14 days after the offer goes "unconditional as to acceptances" (i.e., the number of shares tendered satisfies the minimum tender condition of the bidder"s offer). If, during that 14 day period, tendering shareholders are permitted to withdraw their shares, then the offer would no longer be "unconditional as to acceptances" because the number of shares tendered could be reduced below the amount required to satisfy the minimum tender condition. In this and similar cases, the SEC has been persuaded to permit the bidder to terminate withdrawal rights when the offer goes "unconditional as to acceptances," even though shareholders of the target company are still permitted to tender their shares for 14 days after such time.

1. The SEC"s Approach to Cross-Border Tender Offers

The SEC has confirmed that the "all holder" rule (i.e., that a tender offer must be made to all holders of the class of securities subject to the tender offer) does not prohibit a bidder from making two separate, but contemporaneous, tender or exchange offers inside and outside the United States. In addition, under certain narrow circumstances, the SEC permits alternative consideration to be offered to non-U.S. shareholders that is not available to U.S. shareholders. One example of when a disparity in treatment might be permitted is when a different security might allow the non-U.S. shareholders to avoid adverse tax consequences.

As the volume of cross-border transactions continues to increase, parties will benefit if the SEC continues its flexible approach, as it has done for many years, with respect to foreign issuers of securities in the United States. An example of this flexible approach is the Multijurisdictional Disclosure System, discussed earlier. The MJDS is intended to facilitate cross-border offerings of securities, including rights offerings and tender offers, by specified Canadian issuers. Under the system, specified Canadian issuers can use Canadian disclosure documents to satisfy U.S. registration and reporting requirements. The Canadian MJDS for U.S. issuers is substantially similar to the MJDS adopted by the SEC. The MJDS is based on the fact that the framework of the securities laws, accounting systems, and auditing standards are very similar in the U.S. and in Canada.

2. The SEC"s Proposed Exemptions for Cross-Border Transactions

On November 13, 1998, the SEC issued a release proposing rule changes to facilitate the extension of cross-border tender offers and rights offerings to U.S. investors (the "Release").[(7)] The Release revives initiatives which were first proposed in 1990 and 1991 and reflects the SEC"s concern that U.S. investors in securities of foreign private issuers are being denied the opportunity to participate in certain tender offers and rights offerings relating to such securities. U.S. investors are often excluded from transactions so bidders and issuers can avoid the application of U.S. securities laws. While the SEC proposal is intended to relax the compliance burden placed on persons extending a tender offer or rights offering to U.S. holders, the SEC"s proposal is also intended to maintain certain basic requirements of the U.S. securities laws in order to protect investors. The Release attempts to fulfill both agendas through five new exceptions, three of which are highlighted here.

First, if U.S. holders hold of record 10% or less of the subject securities of a foreign "private" issuer (a foreign issuer whose shares are not registered in the U.S.), tender offers for such securities would generally be exempt from the Exchange Act and the rules thereunder which govern tender offers. This exemption is referred to as the "Tier I" exemption in the Release and would be available to both U.S. and foreign bidders.

Second, when U.S. holders hold of record less than 40% of the class of securities of a foreign private issuer sought in a tender offer, limited tender offer exemptive relief would be available to eliminate frequent areas of conflict between U.S. and foreign regulatory requirements. This exemption is referred to as the "Tier II" exemption in the Release and largely represents a codification of current SEC exemptive and interpretive positions. Apart from this standard exemptive relief, a tender offer subject to Tier II would generally need to comply with U.S. requirements.

Third, under the proposed new Securities Act Rule 802, subject to certain conditions, securities issued in exchange offers for foreign private issuers" securities (and in certain business combinations involving foreign private issuers) would be exempt from the registration requirements of the Securities Act and the qualifications requirements of the Trust Indenture Act of 1939, if U.S. holders hold of record 5% or less of the subject class of securities.

The proposed exemptions do not affect a bidder"s or issuer"s potential liability under the anti-fraud rules of the U.S. securities laws.

G. Combinations between U.S. Companies with Foreign Assets

Cross-border issues arise even in mergers involving two U.S. companies. As noted above, the European Union can review any merger that meets its jurisdictional requirements -- the key factor being whether the merged entity would do enough business worldwide and in the European Union to trigger EU jurisdiction under the Merger Regulation. Examples of the European Community reviewing such transactions include the Boeing-McDonnell Douglas merger and the WorldCom-MCI merger.

IV. A Sampling of Some Recent Cross-Border Transactions

A. Seagram - PolyGram

The Seagram - PolyGram combination was the acquisition of a Dutch company by a Canadian company. As part of the consideration for Seagram"s tender offer, Seagram issued shares and, as a result, a Registration Statement had to be filed with the SEC. While a U.S. acquisition requiring SEC registration would typically be structured as a one-step merger, this transaction was structured as a tender offer because shares of a non-Dutch entity could not be issued in a merger involving a Dutch target. Because PolyGram"s shares were listed on both the NYSE and the Amsterdam Stock Exchange, Seagram needed to comply with the tender offer rules of the SEC, the Dutch Merger Commission and the Amsterdam Stock Exchange. To harmonize the differences, Seagram had to ensure that it would provide PolyGram"s shareholders with the most favorable protections of all these rules. For example, withdrawal rights are not required during the initial offer period under Dutch law. To satisfy U.S. law, Seagram made withdrawal rights available throughout the offer. From a disclosure perspective, Seagram used one offering document for all PolyGram shareholders that satisfied the disclosure requirements of the various regulatory agencies.

Royal Philips Electronics owned 75% of the PolyGram shares and the other 25% were owned by the public. However, most of the other 25% of the shares were held in bearer form through a book entry

trading system in the Netherlands, which made it difficult to know who the beneficial owners were and to assess whether they would tender their shares. Although Philips had agreed to tender its shares, the lack of a registry was significant because Seagram wanted to acquire at least 95% of the shares. Whereas in Delaware a bidder usually needs 90% of shares to be tendered in order to effect a short form merger (or 51% for a two-step transaction), under Dutch law a bidder needs to acquire 95% of the shares in order to acquire the remaining shares pursuant to a judicial "compulsory acquisition" proceeding (which can take more than a year to complete). The 95% minimum condition in the acquisition agreement reflected the threshold needed in a post-closing compulsory acquisition.

Dutch law is more like the Pennsylvania statute than the Delaware statute -- permitting the board of directors of a target company to consider many more variables when evaluating an offer to purchase the company. Seagram made a presentation to the PolyGram board addressing employee issues. As in all acquisitions, employee and executive retention issues needed to be addressed. Especially in multinational transactions, local expectations and integration considerations must be evaluated. Moreover, Dutch law required that the applicable worker"s councils and labor unions be consulted regarding the acquisition. In seeking to address employee concerns, the acquisition agreement provided up to $40 million as a retention pool for the purpose of retaining the services of selected key employees and required that Seagram maintain PolyGram"s severance plans for at least one year following the closing and generally to make 150% of the severance payments required thereunder.

B. Daimler Benz - Chrysler

As discussed earlier, DaimlerChrysler"s global ordinary shares are now listed on 19 stock exchanges around the world, including the NYSE (where they trade as ordinary shares, not as ADRs). DaimlerChrysler seems to have overcome any "flow back" issue, with U.S. shareholders continuing to hold a very substantial percentage of the shares. DaimlerChrysler"s global share does not, however, qualify for inclusion in the S&P 500, even though the stock of Chrysler was previously included.

Daimler-Benz was not able to make an exchange offer for Chrysler shares itself, since German companies cannot issue shares without a regulatorily approved capital increase, which is somewhat complicated. For that reason and a number of others, including to assure the continued holding of shares by German institutions, a new German company, DaimlerChrysler A.G., was created to acquire both companies, with both sets of shareholders ending up with shares in the new company. The acquisition company had to be incorporated in a country that was a member of the European Union in order for the merger to be tax-free to Daimler-Benz shareholders.(8) An additional reason to incorporate in Germany was that under German law the shareholders receive an imputed tax credit on the taxes the German company has paid in respect of the dividends the company pays to its shareholders.(9) The exchange offer for Daimler-Benz" shares required 80 percent participation and 90 percent to achieve pooling.(10) The exchange ratio was somewhat complicated, providing for an adjustment to account for Daimler"s annual dividend, a special distribution and the impact of a Daimler rights offering.

The transaction was tax-free to both sets of shareholders and was accounted for as a pooling of interests. In order to achieve tax-free treatment for Chrysler shareholders, Daimler-Benz shareholders needed to end up with over 50 percent of the combined company.(11)

German companies have two boards of directors, a supervisory board, in which board members are evenly divided between employee representatives and outside shareholders, and a management board, appointed by the supervisory board, consisting of the company"s senior managers. In the case of DaimlerChrysler, 10 executives from Daimler and 8 from Chrysler sit on the management board. The

German Unions gave one of the seats on the supervisory board to the United Auto Workers. Deutsche Bank Chairman Hilmark Kopper is the Chairman of the supervisory board. On DaimlerChrysler"s supervisory board, 5 of the shareholders representatives are from the former board of Chrysler and 5 are from the former board of Daimler. J|rgen Schrempp, the former Chairman of Daimler, and Robert J. Eaton, the former Chairman of Chrysler, are co-chairman of the management board and co-CEOs.(12) Robert Eaton is scheduled to retire in three years. The company maintains dual headquarters in the U.S. and Germany.

C. MCI - BT (terminated in face of superior offer from WorldCom)

Before merging with WorldCom in 1998, MCI, in November 1996, entered into a merger agreement with British Telecom, and subsequently entered into an amended version of that merger agreement in August 1997. BT had purchased a 20% equity interest in MCI in 1994 and the merger agreement was intended to be an expansion of that relationship and "strategic" for purposes of Delaware law.

The MCI-BT merger agreement had a fixed exchange ratio plus a cash component. While the agreement contained a number of merger of equal features, the pricing included a premium to MCI shareholders. The exchange ratio also permitted BT to pay its ordinary dividends and a special distribution to its shareholders prior to the merger. The merger required the approval of both sets of shareholders and various regulatory approvals, including the FCC. The merger was to be effected by the merger of MCI into a wholly owned, newly formed U.S. subsidiary of BT.

While BT had ADRs traded on the NYSE, the number of shares listed represented only slightly over 2% of BT"s market capitalization. MCI"s market capitalization was approximately 60% of the size of BT"s, so the contemplated registration of BT ADRs to effect the merger was massive. In order to reduce the negative market impact of "flow back," it was announced that post-merger the combined company would engage in a substantial share buy-back.

The shareholder profile of the two companies was quite different. BT pays out 60-70% of its net income as dividends and, therefore, attracts investors seeking a return; MCI"s shareholder base was growth-oriented. Dividends in the U.K. are tax-advantaged relative to dividends in the United States, since Advance Corporation Tax paid by U.K. companies creates a tax credit for its shareholders. The special distribution before the merger was intended to give BT shareholders a tax advantaged distribution and prepare them for a somewhat reduced dividend in the future.

The transaction would have been taxable to MCI shareholders on their gain, to the extent of cash received, and otherwise tax-free.

Some of the "merger of equals" features included co-chairmen roles for Sir Iain Vallance and Bert Roberts; eight directors from BT, seven directors from MCI; five out of the first ten meetings of the Board each year were to be held in the U.K. with Sir Iain Vallance acting as Chairman and the other five were to be held in the U.S. with Bert Roberts presiding; an Office of the Chief Executive Officer, consisting of one BT officer and one MCI officer; employment contracts for a number of senior management; U.K. and U.S. headquarters and the "hiving down" of BT"s operations into an operating company. BT was to be renamed "Concert" and moving BT"s operations into a subsidiary and making Concert into more of a co-managed holding company was intended to look and feel more like a merger of equals.

The U.K. government owns a "special share" in BT which essentially provides that without U.K. government approval (i) a non-U.K. person cannot own more than 15% of BT"s ordinary shares and (ii)

the senior executive of the company must be a U.K. citizen. It was anticipated that in connection with the merger, the U.K. government"s special share would be redeemed.

As to FCC approval, the parties were required to go forward with the merger as long as the FCC approval did not contain a "burdensome condition," essentially a condition that would have a materially adverse effect on one of the companies or the combined company.

In connection with the merger, MCI entered into an extensive retention bonus plan for senior management and middle management.

The amended merger agreement provided for a substantial termination fee if BT"s shareholders failed to approve the transaction.

The MCI/BT merger had been negotiated as a strategic combination and contained a tight no-shop covenant with a fiduciary out that required MCI"s board of directors to conclude, prior to providing any information to, or engaging in discussions or negotiations with, any competing bidder such as WorldCom or GTE, that the unsolicited proposal made by them was a "superior proposal" (satisfying a number of criteria) which, if consummated, would result in a transaction more favorable to MCI"s stockholders. To the extent MCI reached such a conclusion, it was permitted to provide information to, or discuss or negotiate with, WorldCom or GTE only if MCI then determined that such action was necessary for the Board to comply with its fiduciary obligations. The MCI Board was able to negotiate a waiver from BT that enabled it to receive information from, and engage in discussions with, WorldCom and GTE. By relying on a waiver, as opposed to trying to satisfy the superior proposal element of its no-shop covenant, MCI avoided terminating its BT agreement and committing to a break-up fee before it had a new agreement. In addition, BT had greater than typical contractual rights in regard to approval of MCI business combinations because of its earlier purchase of 20% of MCI in 1994.

WorldCom ultimately agreed to pay $51 a share for MCI"s stock, payable in WorldCom stock. BT consented, and MCI entered into a definitive agreement with WorldCom.

During the regulatory approval process for the WorldCom-MCI merger, MCI was required by the EC and the Justice Department to sell its Internet business, ultimately to Cable & Wireless, in order to ease regulators" concerns that MCIWorldCom would have too large a share of Internet traffic. MCI tried to satisfy regulators concerns by selling its wholesale Internet infrastructure, but the EC was not satisfied and required the sale of the retail Internet business as well. Interestingly, in this merger of two U.S. companies, the EC took the lead in pushing the divestiture, since its review had a more rigid timetable, described earlier, than that of the Justice Department.

D. Teleglobe-Excel

In the Teleglobe (Canadian company) - Excel (U.S. company) transaction, shareholders of Excel received registered shares of Teleglobe listed on the N.Y.S.E. in a stock-for-stock exchange, with a newly formed U.S. subsidiary of Teleglobe merging into Excel, with Excel surviving as a subsidiary of Teleglobe. The transaction was structured as a strategic merger of equals containing the following provisions: no premium; balanced representations, warranties and covenants; and 7 directors from each of the companies, with a fifteenth director chosen mutually.

Simultaneously with the execution of the merger agreement, a majority of the shareholders of each of the companies entered into a consent and voting agreement approving the transaction. In addition, each

of the companies granted a stock option representing 19.9% of its shares to the other, exercisable under certain circumstances, including if a third party were to acquire in excess of 25% of the issuer"s shares. The merger agreement did not contain any "fiduciary outs."

It was a condition to closing that the transaction be tax-free to both sets of shareholders. With Teleglobe, a Canadian company, as the acquirer, tax-free treatment would not be available to the Excel shareholders unless Teleglobe shareholders, following the merger, held a majority of the shares. Because the market capitalizations of the two companies were so close in value, normal fluctuations in trading price could affect the calculation and, as a result, a revenue ruling from the I.R.S. was sought and obtained providing that the U.S. shareholders would not be deemed to own in excess of 50% of the combined company based on historical ownership information, rather than the relative market capitalization at any time.

As a result of the different sets of accounting principles in the United States and Canada (namely, the fact that in Canada, if the shareholders of the acquiring company wind up owning more than 50% of the company following the merger, the transaction is treated as an acquisition, which was the case with Teleglobe and its shareholders), the merger is being accounted for as a pooling of interests in the United States and a purchase in Canada.

In gaining the necessary stock exchange approvals, Teleglobe, a NYSE listed company, was able to benefit from the NYSE"s unwritten policy of deferring to the rules of the principal exchange on which an issuer"s securities are listed. As mentioned, the shareholders of both companies owning over a majority of the shares acted by written consent to approve the transaction. While the rules of the NYSE suggest that it would not normally approve the taking of action by majority written consent to satisfy the requirement that the stockholders approve the issuance of more than 20% of the outstanding shares of an issuer, because the Toronto and Montreal Exchanges permitted action by written consent and deemed the consent sufficient to approve the issuance of the Teleglobe shares in the merger, the NYSE deferred to the policies of those exchanges and the issuance did not require formal Teleglobe shareholder approval.

The Teleglobe transaction required Teleglobe to solicit the approval of its stockholders for a charter amendment to put in place certain mechanisms to preserve the structure of its Board and management, as agreed to as part of the merger. Because Teleglobe, under U.S. securities laws, is a foreign private issuer, it is not subject to Section 14 of the Exchange Act and therefore was not required to prepare its proxy statement in connection with the charter amendment in accordance with the U.S. proxy rules, nor was it required to deliver an information statement in accordance with Regulation 14C to its shareholders (as was Excel in connection with the approval of the merger) in connection with the approval of the share issuance by written consent.

1. Edward F. Greene et al., *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 U. Miami L. Rev. 823, n.6, n.29 (1997).

2. Masatake Yone and Stephen Overton, Asia Law Supplement Japan, CROSS-BORDER M&A.

3. Franci J. Blassberg, *Eleventh Annual Corporate Law Symposium: International Aspects of Mergers and Acquisitions*, 66 U. Cin. L. Rev. 1071, 1073 (1998)

4. Wilson Chu, *The Human Side of Examining A Foreign Target*, Mergers & Acquisitions, January/February 1996, at 35.

5. In addition to the U.S., Canada and the EU, the following countries, among others, have merger control legislation: all of the Member States of the EU (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, UK -- if the EU Merger Regulation does not apply to a transaction, the national rules of the relevant member State or States will apply), Australia, Brazil, Czech Republic, Hungary, India, Israel, Japan, South Korea, Mexico, New Zealand, Norway, Poland, Russia, Slovakia, South Africa, Switzerland, Taiwan, Turkey and Venezuela.

6. Of the countries identified in footnote 19, over 70% had no merger regulation legislation prior to 1990.

7. SEC Release No. 33-7611, 34-40678 (November 13, 1998).

8. Deal Spotlight: A Closer Look at Chrysler-Daimler, Corporate Control Alert, July/Aug. 1998, at 8, 9.

9. Id.

10. Id.

11. Id. at 8.

12. Id. at 9-10.

Sorry Counsel, You Signed It: Ethics, Rule 9011, and Inadequate Filings*

LEWIS AND ROCA LLP LAWYERS
By Susan M. Freeman

I. Standards for Imposing Sanctions.

Bankruptcy Rule 9011 requires an attorney for a represented party to sign every paper filed in a bankruptcy case "except a list, schedule, or statement, or amendments thereto." Bankruptcy Rule 9011 (a). The exception has led some courts to question whether the rule applies to a debtor's counsel when misrepresentations are made in the debtor's schedules and statement of affairs.[1] But subpart (b) of Rule 9011, as amended in 1997, provides for sanctions not only with respect to documents signed by an attorney, but also documents he "presents" by "filing" or "later advocating." Bankruptcy Rule 9011(b). Courts have relied on this language to hold counsel accountable for inaccuracies and misstatements in schedules.[2]

The pending Bankruptcy Reform Act and its predecessors over the past few years have included a "sense of Congress" that Rule 9011 should be amended to require all documents, including schedules, to be submitted only after the debtor or debtor's attorney has made a reasonable inquiry to verify the information.[3] That proposed legislation implies that Rule 9011 does not currently empower the court to sanction the debtor's counsel for misleading schedules.[4] To the extent Rule 9011 is inapplicable, however, some courts have employed their "catch all" powers under Bankruptcy Code § 105 and inherent authority of the court to sanction misconduct, including with respect to bankruptcy schedules. [5]

The standards for imposition of sanctions are different under Bankruptcy Rule 9011 and under Code § 105. Rule 9011 provides that all documents within its scope require the lawyer's certification of proper purpose, warranted by law or a non-frivolous argument for extension or reversal of the law, and evidentiary factual support. Bankruptcy Rule 9011(b).[6] Sanctions accordingly require only a showing of objectively unreasonable conduct, or alternatively, a subjective determination of an improper purpose.[7]

In contrast, sanctions may be imposed under the inherent power of the court and Code § 105 only upon a finding of "bad faith."[8] This concept "contemplates a state of mind affirmatively operating with furtive design or ill will,"[9] or a "defiling of the very temple of justice."[10]

There are other sources for sanctions authority as well. Bankruptcy Rule 7037 sanctions failure to cooperate in discovery, and Bankruptcy Rule 7016 sanctions failure to comply with court scheduling and pretrial orders or cooperate in discovery and pretrial practice. 28 U.S.C. § 1927 also prohibits unreasonable and vexatious litigation.[11] Incompetent representation, not complying with the Bankruptcy Code and Rules, may also be sanctioned through denial of court approval of employment. [12] Obnoxious and abusive behavior toward opposing counsel, parties or the judge may likewise be sanctioned under Rule 9011 and the court's inherent authority.[13] The federal bankruptcy court must apply federal sanctions laws, however, not state counterparts.[14]

II. Ethical Obligations of Counsel for a Debtor Filing Documents.

Ethics rules are in accord with Rule 9011.[15] Ethically and legally, counsel can only advise the debtor, who makes the decisions.[16] But counsel exerts some or even considerable influence on bankruptcy strategy.[17] Counsel can and should develop "client control" through advising the client on the parameters of available alternatives and remedies, and not allowing a client to dictate activity in a case inconsistent with legal requirements.[18] Lawyers can and must take care to assure that representations to the court are accurate.[19]

Vigorous advocacy is ethical and appropriate in bankruptcy as in other cases, as long as it meets Rule 11 standards with a good faith basis for the facts and law asserted on positions taken for reasons other than harassment or delay. In Chapter 11 cases, good faith turns in part on whether reorganization is still

possible.[20] Thus, acquiescing in and carrying out a client's "scorched earth" strategy or otherwise assisting insiders in actions detrimental to the estate and creditors, if it is shown that counsel knows reorganization is hopeless, likely would not meet the good faith standards of ethics and Bankruptcy Rule 9011.[21] Pursuing a plan that benefits insiders, at the considerable expense of the arms-length creditors, may also exceed the boundaries of good faith in some circumstances, and be considered DIP self-dealing.[22] Acquiescing in DIP management self-dealing,[23] without any attempt at counseling and without full disclosure to the court and creditors of insider involvement in (and benefit from) transactions, is a breach of DIP counsel's duties.[24] Advocating a sale agreement with a "no shop" clause instead of seeking or entertaining other offers to maximize the estate's value, especially if the clause is not disclosed, violates fiduciary duties.[25]

A thorough analysis of the legal theories underpinning -- and delimiting -- the fiduciary duties of DIP counsel is found in Hansen, Jones & Leta, P.C. v. Segal.[26] The court explains that DIP counsel's client is the DIP, not the "estate," and identifies the duties counsel owes to the DIP and to the court. The court further explains why DIP counsel does not owe duties to the DIP client's beneficiaries, the equity holders and creditors who have conflicting interests. The court holds that estate interests are protected when the court focuses on whether DIP counsel breached counsel's fiduciary duty to the client DIP, violated Code obligations or failed to provide services that benefit the estate (instead of insiders). The rights and powers vested in creditors and other parties in interest provide further protection. Another excellent analysis of DIP and DIP counsel fiduciary duties is set forth in In re Water's Edge Ltd. Partnership.[27]

III. Sanctionable Filings in Bankruptcy Cases

A. Serial Cases

Courts all over the country have found multiple filings to frustrate secured creditor foreclosure efforts to be sanctionable by orders prohibiting additional filings by the same debtor or a related debtor holding the collateral.[28] Bankruptcy Code § 349(a) authorized the court to dismiss a bankruptcy case with prejudice, and Code § 109(g) prohibits individual and family farmer repeat filings within 180 days of a case dismissal for either willful failure to abide by court orders, or a voluntary dismissal after a stay relief request. Code § 109(g) underscores Congress' distaste for bad faith serial filings, and the public policy in favor of sanctions for such abuses. It does not preclude comparable or more severe relief for debtors falling outside its express provisions.[29] The Code's broad grant of equitable power in § 105 has also been cited as authority for such prohibitions on re-filing of bankruptcy cases.[30]

Not every serial filing is wrongful. The United States Supreme Court has held a serial filing of chapter 7 and chapter 13 cases is not categorically foreclosed.[31] The test for a bad faith filing is "whether a debtor is attempting to unreasonably deter and harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis."[32]

It is incumbent on bankruptcy counsel to know the law on bad faith serial filings. Counsel may be sanctioned along with her client when the bankruptcy case is found to be a bad faith serial filing.[33] A lawyer is not excused by purportedly not knowing this aspect of bankruptcy law.[34] The lawyer must "closely inquire and determine the true intent and honesty of purpose of the debtor's new petition and financial capacity to consummate a plan and overcome the prior reasons for termination of the stay and/or dismissal".[35] Counsel should undertake the easy task of checking for previous bankruptcies via Pacer, instead of simply accepting the client's representations of no previous filings.

B. Otherwise Legally Unsupportable Cases

Serial cases are not the only ones that may be filed in bad faith. First-time filers, too, may proceed solely to delay a creditor with no realistic possibility of reorganizing a debtor under Chapter 11, or file merely to resolve a two-party dispute. Section 707(b) of the Code specifically authorizes the court to dismiss petitions by consumer debtors that are considered a "substantial abuse" of Code provisions. Counsel are ethically obliged not to file such petitions, and may be sanctioned for doing so.[36]

- **The Debtor Cannot Reorganize.** A chapter 11 case may be filed by a corporation whose charter has been revoked. Under state law, the corporation continues as a "body corporate" only for the limited purpose of winding up its affairs.[37] A revoked corporation may be a debtor, but it is only eligible for liquidation.[38] The *Prism* court analyzed the various decisions addressing bankruptcies of corporations with revoked charters and the relevant state statutes on rights of dissolved entities. It concluded that "[t]he Bankruptcy Court is not empowered to continue a corporation's existence through reorganization as a going concern when state law dictates that it no longer exists. . . State law provides, however, that after revocation a corporation may continue to act to preserve and pursue assets and claims and settle liabilities, and accordingly the Debtor may liquidate under the Bankruptcy Code, either via a liquidating Chapter 11 plan or under Chapter 7."[39] The debtor also may be unable to reorganize as a practical matter, having no employees or operations or likelihood of rehabilitation.[40]

Sanctions may be imposed under Rule 9011 on counsel filing a chapter 13 case when the chapter 13 debtor is ineligible to proceed with his or her plan.[41] The integrity of the chapter 13 system rests in the first instance with the debtors' bar, and courts expect them to make responsible judgments about eligibility of debtors before filing chapter 13 petitions, in compliance with Rule 9011. The fact that a chapter 13 debtor is unable to confirm a plan does not necessarily mean the case was filed or pursued in bad faith, however, especially if the debtor otherwise complies with all Code requirements.[42]

- **Case Filed for Improper Purpose.** A chapter 7 case may have no reasonable basis to proceed, just like a reorganization. The estate may have no assets to protect, or no need to discharge debts, and be filed merely to serve a non-economic motive, generally delaying a creditor.[43] A bankruptcy case may be filed simply to forum-shop when undesirable results are reached in state court. [44] Or a "new debtor" entity may be created in to file a bad faith case.[45]

- **Solvent Estate.** When an estate is solvent, DIP fiduciary duties may preclude a bankruptcy filing at all. Insolvency and inability to pay debts are not prerequisites for bankruptcy relief under the Code.[46] However, bankruptcy cannot be a mere tactical device for litigation leverage. If a solvent debtor is not suffering any adverse financial or operational effects, a bankruptcy petition may be deemed filed in bad faith, under chapter 11 or 7.[47] Even if the filing is proper, a solvent DIP may not use avoidance powers to obtain a windfall for the equity holders at the expense of the non-insider creditors.[48]

C. Inadequate Schedules

In addition to Bankruptcy Rule 9011 requirements, counsel is obligated both ethically and as an officer of the court not to file schedules and other disclosure documents he believes inaccurate.[49] Thus, courts have cautioned that before filing a petition, schedules, etc., it is incumbent upon counsel to "take all possible steps to assure himself that the information listed in his client's petition is correct . . . inquire as to amounts owed [secured by any assets] and to explain the requirements of full disclosure . . . ."[50] This means that a lawyer cannot simply accept his client's statement that he does not know the value of an asset, but must ask follow-up questions.[51] Concepts

such as "market value" entail legal judgments and the advice of experienced counsel.[52] Counsel must explain the matter to the extent necessary to permit the debtor client to make informed decisions about the information set forth in the schedules.[53]

Even if a lawyer is negligent in initially omitting an asset from schedules, he may be sanctioned if he has subsequent opportunities to review and correct them.[54] The obligation to correct errors in filed documents is a continuing duty.[55] A supervising attorney has a specific obligation to correct an assistant's failures, especially since a material error can support a conviction for bankruptcy fraud.[56] It is also critical that counsel not participate in deliberately scheduling assets for less than their known market value, or omitting creditors and claims.[57]

The duty to disclose assets on schedules includes disclosure of all potential causes of action.[58] That includes causes of action against the debtor's principals for negligence, mismanagement, and breach of fiduciary duty, when such a suit would be beneficial for the estate (albeit not the debtor's insiders).[59] Failure to disclose potential fraudulent transfer claims against insiders may be deemed a fraud on the court.[60]

While counsel has an obligation to encourage disclosure, the creditors should not have to pay more for an incompetent or deceptive debtor who thwarts disclosure, through shouldering increased counsel fees.[61] Courts have suggested guidelines for counsel working with debtors on disclosure to resolve this tension:

1. Explain the requirement of full, complete, accurate and honest disclosure of all information required of the debtor;

2. Ask probing and pertinent questions designed to elicit full, complete, accurate and honest disclosure from the debtor;

3. Check the debtor's responses in the petition, statements and schedules to be sure they are internally and externally consistent, and follow up if they are not; check readily available Pacer information for previous bankruptcies;

4. Demand of the client full, complete, accurate and honest disclosure of all information required by the debtor prior to the attorney's signature being placed upon the document, or before filing the client-signed document;

5. Seek relief from the court of the client representation in the event that the attorney learns he has been misled by the client. [62]

The debtor's counsel should also take heed of objections and motions by creditors, which may disclose serious problems and concerns with the DIP's operations and representations to counsel. [63]

D. Compensation and Conflict Disclosures

There are far too many cases in which counsel have claimed to be disinterested when seeking court approval of employment as DIP counsel, without disclosing the ties of firm members to the debtor, its management, or the creditors. It is not for the DIP or its counsel to determine unilaterally whether a connection is relevant; the court is to review all connections and decide whether there are any disqualifying conflicts.[64] Disclosures must be sufficiently detailed to enable the court to understand

the magnitude of the connections and potential conflicts, and must be strictly accurate.[65] An employment application with full disclosure must be made for each professional firm employed; undisclosed subcontracting is impermissible.[66] Disclosure through the schedules and statement of affairs, an exhibit to the petition, testimony at the first meeting of creditors, or monthly operating report entries is inadequate. The court has no duty to search the file and ferret out information on conflicts.[67]

Disclosure is an ongoing responsibility. If potential conflicts arise after the initial application and disclosure, they should be brought to the court's attention promptly.[68]

Full disclosure of all aspects of fee arrangements is also required.[69] Even if an attorney limits her representation to prepetition advice or even petition preparation alone, a Rule 2016 statement must be filed.[70] The absence of full disclosure of fee payment arrangements in a chapter 13 case means the client's plan disclosures are likewise erroneous, impairing the client and creating a conflict.[71] Complete disclosure of prepetition payments "in connection with" and "in contemplation of" bankruptcy must be disclosed, in addition to disclosure of retainer arrangements.[72]

Rule 9011 applies to employment applications and affidavits. Thus, attorneys are obliged to inquire into and analyze the factual and legal elements of every document signed and filed.[73] A half-hearted inquiry into conflicts among firm members is inadequate. It is counsel's responsibility to ensure complete disclosure.[74] Special counsel cannot simply rely on the DIP's primary bankruptcy counsel to handle necessary filings.[75] Committee counsel may be sanctioned like debtor's counsel for inadequate disclosures.[76] A secured creditor's counsel may likewise be sanctioned for misrepresenting fee arrangements when seeking fees as part of a secured claim under Code § 506(b).[77]

The most common consequence of non-disinterestedness or inadequate fee disclosure is fee denial or disgorgement of interim payments, but termination of the representation is not infrequent, and sanctions have extended to suspension from practice, disbarment, and even criminal convictions for blatant non-disclosure violations.[78] The court may disqualify counsel from representing the DIP based upon an objective standard, evaluating the facts of each case, regardless of the integrity or intent of the attorney.[79] An evidentiary hearing is not required before a court requires disgorgement of fees on grounds of disqualification.[80]

E. Frivolous and Bad Faith Adversary Litigation

In addition to administrative filings, adversary litigation is rife with sanctions rulings, from frivolous adversary proceeding complaints[81] to bad faith objections,[82] frivolous motions and appeals,[83] and failing to cooperate with discovery requests.[84] Burdensome, unnecessary discovery requests may likewise be deemed sanctionable.[85] And counsel for the debtor all too often acquiesces in his client's request to list all claims as disputed on the schedules, or file blanket objections to claims, which creditors may not dispute only because economically infeasible to do so. Strategies designed to make opponents capitulate because litigation is prohibitively expensive may result in sanctions against counsel as well as adverse consequences to clients.[86] Irresponsibly drafted and inflammatory language in pleadings may show their improper, sanctionable purpose.[87]

Counsel may also be sanctioned under Rule 9011 for pursuing or agreeing to reaffirmation agreements without having first ensured that the debtor is informed as to the legal effects and consequences of the reaffirmation, and verified that the reaffirmation will not impose an undue hardship.[88]

IV. Reacting to Client Misconduct

What should counsel do when she learns that her client has lied or her client asks her to lie or otherwise circumvent bankruptcy law restrictions? Rather than carrying out client directions exceeding good faith boundaries, the debtor's attorney has ethical obligations to counsel her client with respect to its fiduciary duties.[89] As stated in the comment to Model Rule of Professional Conduct 1.6, "The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights."[90]

If the operating head of the DIP entity fails to act in compliance with the DIP's fiduciary responsibilities, the lawyer may have to refer the matter higher up the chain of command to the chief executive officer or board of directors. The lawyer is to consider the seriousness of any illegality and its consequences in deciding what to do within the organization, however, and is to minimize any disruption to the entity and the risk of revealing information to outsiders.[91] If a lawyer "develops material doubts about whether a proposed course of action in fact serves the estate's interests, he must seek to persuade his client to take a different course or, failing that, resign."[92] DIP counsel may in some cases be obligated to bring the DIP's breaches of fiduciary duty to the attention of the court.[93]

Thus, counsel is to urge the DIP to meet its fiduciary duties to creditors, but is to abide by the client's decisions as long as there is a nonfrivolous basis for doing so.[94] If the attorney and client disagree, it is not the attorney's prerogative to act on her own as she believes best for the estate, but rather to refrain from filing bad faith or frivolous pleadings, and to withdraw if the high standards for withdrawal are met. If the attorney fails to appropriately counsel the client and carries out an abusive client strategy, her fees may well be subject to attack–refunds of previously allowed interim payments have been mandated where the court has found unethical conduct.[95]

The attorney is to explain legal requirements to the extent reasonably necessary to permit the client to make informed decisions.[96] But the lawyer may not follow client instructions if they would operate to defraud,[97] and may not knowingly make or affirm a false statement of material fact or law to others or fail to disclose a material fact necessary to avoid defrauding others.[98] A disclosure statement, motion to approve a settlement or sale, or the like may well entail an evaluation of facts and law for use by third persons often unrepresented themselves. Counsel is to disclose any limitations on information used in making the valuation, and not state or imply that the lawyer is disinterested rather than the advocate of her DIP client.[99]

Despite her diligence, an attorney nonetheless may discover that her client has committed perjury on his schedules and statement of affairs by concealing assets or asset transfers, or deliberately omitting creditors or misrepresenting important facts. Counsel also may learn that the client has lied in testimony, or misrepresented facts to the attorney that were the basis of positions taken on his behalf. The attorney must preserve client confidences, but not to the extent of implicitly sanctioning illegality.[100] Counsel may not further the illegal purpose, including by suggestions of concealment, nor may counsel continue assisting in conduct discovered to be criminal or fraudulent.[101] The client must be warned that he may forfeit his discharge, be liable under the bankruptcy crimes statute and criminal perjury statute, and that a trustee will likely be appointed if not already serving.[102] The client must also be warned that the attorney-client privilege does not protect criminal plotting or statements made to counsel about it, and that counsel may be obliged to turn over all books and records.[103]

The client should be counseled to rectify the situation as much as possible, such as by supplemental filings mailed to affected parties.[104] If the client is unwilling to do so, the attorney must

withdraw and, if necessary to remedy the situation or the attorney cannot withdraw, he may have to reveal the misrepresentations to the court.[105] Counsel may withdraw or disaffirm any document, which would probably be deemed necessary to remedy the filing of a misleading document with his signature, such as a disclosure statement, and perhaps also to remedy the filing of fraudulent schedules and statements of affairs signed by the client.[106]

Client failures to communicate or otherwise cooperate with counsel, insistence on pursuing an objective the lawyer considers improper, or client conduct which renders effective representation unreasonably difficult may also warrant a court request for withdrawal.[107] It may also become clear that there are insufficient unencumbered assets to pay counsel, making the representation unreasonably financially burdensome. Although the ethical rules authorize a request for withdrawal in such circumstances, it may not be allowed.[108] In the event of withdrawal, counsel must take reasonable steps to protect the client's interests, such as giving the client notice and an opportunity to employ other counsel, turning over the client's papers and property, and refunding unearned retainers.[109]

V. Procedures for Obtaining Sanctions.

Until the 1997 modification of Rule 9011, upon any violation the court was required to impose an appropriate sanction; it exercised discretion only in deciding what sanction was appropriate under the circumstances.[110] Now, sanctions are discretionary, and there is a safe harbor procedure for serving a sanctions motion and giving an opportunity to withdraw the offensive document before filing the motion.[111] The safe harbor does not apply to the filing of a bankruptcy petition, however, given its immediate and serious consequences.[112] Otherwise, it is a mandatory requirement for a Rule 9011 sanctions motion.[113]

Sanctions generally take the form of attorneys' fees awards to opponents; in some cases attorneys and clients have been held jointly liable for the opponent's fees and doubled costs, or additional monetary amounts.[114] Rule 9011 now includes a provision on the nature and limitations of sanctions. A sanction imposed for violation of that rule is to be limited to what is sufficient to deter repetition of the conduct by the one sanctioned or others similarly situated. It may consist of non-monetary directives, a court penalty, or an order to pay reasonable attorneys' fees and costs incurred as a direct result of the violation.[115] Sanctions may also include disgorgement of retainers or interim fees previously awarded to DIP counsel.[116] A chapter 7 attorney may likewise be precluded from recovering compensation for a petition filed in bad faith.[117] Sanctions under other authority than Rule 9011, including the inherent power of the court, may be stiffer, as described in section I, *infra*.

The party seeking sanctions has a duty to mitigate its damages by using reasonable efforts to resolve disputes by inexpensive means, but need not take actions that would impair its rights.[118] The sanctioned attorney and affected parties may stipulate to a settlement; the court may approve it or may impose more draconian sanctions.[119] The court imposing sanctions is to consider the ability to pay of the sanctioned party or attorney, but only if limited ability to pay is raised in a timely manner.[120]

Counsel is entitled to a meaningful opportunity to explain his conduct before sanctions are awarded, generally but not necessarily at a "show cause" hearing.[121] An evidentiary hearing is not required, however. An opportunity to respond by brief or oral argument may suffice.[122] A sanctions award must specify how the fees and expenses were calculated, and how they were caused by the conduct of the parties sanctioned, so the appellate court has sufficient basis to review the decision.[123] Adequate notice is important before any sanctions hearing, but especially important if the severe

sanction of disbarment from the bankruptcy court is to be considered.[124] The prerequisites of adequate notice are (1) the fact that sanctions are under consideration, (2) the reasons why (*i.e.* the conduct alleged to be sanctionable), and (3) the form of sanctions under consideration, generally including the legal rule on which sanctions will be based.[125] If inadequate notice is given, the error may be cured by an immediate stay of the results and a scheduled reconsideration hearing.[126]

Rule 11 motions for sanctions, like all other motions, must be filed in good faith. Rule 11 does not mandate punishment just because an adversary's theory is rejected at trial, and is not intended to "kill an attorney's enthusiasm or creativity."[127] Courts generally evaluate whether an objectively reasonable basis for the attorney's contentions was asserted, in deciding on sanctions requests, even if the attorney ultimately lost on the merits.[128] Sanctions may not be imposed against counsel merely because the court finds the client's testimony not credible, or objects to the form of a respectful communication.[129] But a sanctions motion that is itself replete with vituperation and abuse will not be tolerated, even if it asserts a colorable claim.[130] Mitigating and aggravating factors bearing on the type of sanctions to impose include the degree of willfulness involved, the person's expertise and prior history and ability to pay, the nature and extent of prejudice and expense suffered by the offended person, and burdens on the court system.[131]

VI. Collateral Consequences – at the Bar and in the Prison

Other possible sanctions include a reprimand, reference to bar disciplinary authorities, an order precluding the introduction of evidence or litigation of certain issues, default judgment or dismissal, injunctive relief limiting future access to the courts to a party or attorney, or mandatory legal education, generally in the areas of bankruptcy and legal ethics.[132]

Several courts have imposed sanctions in the form of suspension or disbarment from practice in the bankruptcy court.[133] Pro hac vice status may likewise be revoked.[134] The suspension may last only until sanctions are fully paid, but may last for years.[135] The suspension may even be permanent until and unless a reapplication is accepted.[136] The bankruptcy court or appellate court may refer its sanctions determination to the state professional disciplinary authority, commencing a state disciplinary process.[137] While counsel may introduce mitigating evidence bearing on appropriate punishment at the state hearing, either applicable state rules or the doctrine of offensive non-mutual collateral estoppel may prevent the lawyer from re-litigating the facts or law relating to sanctioned conduct.[138] A state supreme court's suspension or disbarment typically results in the same discipline being imposed in the federal courts where the attorney practices.[139]

Worse still, sanctionable activity may warrant a criminal conviction. The lawyer enabling false and misleading schedules to be filed may be convicted of aiding and abetting the fraudulent concealment of property from the bankruptcy trustee.[140] If so, status as an attorney may warrant a sentence enhancement.[141] Filing a false and misleading Rule 2014/2016 statement of disinterestedness, and confirming it in court, may result in conviction on counts of bankruptcy fraud and perjury.[142] Failing to obey a court sanctions order may be deemed criminal contempt.[143] The bankruptcy court or district or circuit court on appeal of a bankruptcy order may refer its disciplinary decision to the United States Attorney to consider prosecution.[144]

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[1] See In re Ostas, 158 B.R. 312, 319 (N.D.N.Y. 1993); In re Palumbo Family Ltd. Partnership, 182 B.R. 447, 475-76 (Bankr. E.D. Va. 1995); In re Engel, 246 B.R. 734, 788-89 (Bankr. M.D. Pa. 2000).

[2] See In re Kelley, 255 B.R. 783 (Bankr. N.D. Ala. 2000)

[3] S.420 § 319; H.R. 333 § 319, as passed by the Senate and House of Representatives.

[4] Kelley, 255 B.R. at 786.

[5] See In re Rimsat, Ltd., 212 F.3d 1039, 1048 (7th Cir. 2000)(affirming sanction under § 105 and Rule 9011); In re Bryson, 131 F.3d 601, 603 (7th Cir. 1997)(§ 105 permits punishment of conduct Rule 9011 cannot reach); In re Rainbow Magazine, 77 F.3d 278, 284-85 (9th Cir. 1996)(same); In re Clark, 223 F.3d 859, 864 (8th Cir. 2000); Engel, 246 B.R. at 789; Kelley, 255 B.R. at 786;

[6] If specifically identified, a factual contention may be designated as likely to have evidentiary support after a reasonable opportunity for further investigation or discovery and a denial be reasonably based on a lack of information or belief. Bankruptcy Rule 9011(b)(3), (4).

[7] In re Collins, 250 B.R. 645, 661-62 (Bankr. N.D. Ill. 2000)(extensive citations); In re Mahendra, 131 F.3d 750, 759 (8th Cir. 1997) (objective determination of whether a party's conduct was reasonable under the circumstances); In re Marsch, 36 F.3d 825, 830 (9th Cir. 1994)(consider frivolousness and improper purpose on a sliding scale; the more compelling the showing as to one element, the less decisive need to show the other); Singer Furniture Acquisition Corp. v. SSMC, Inc., 254 B.R. 46, 59 (M.D. Fla. 2000) (need only show one of three alternatives: legally baseless, factually baseless, or improper purpose).

[8] Chambers v. NASCO, Inc., 501 U.S. 32, 44, 111 S.Ct. 2123, 2135 (1991). The finding need not be set forth explicitly in those "magic words", however. In re Rimsat, Ltd., 212 F.3d 1039, 1047 (7th Cir. 2000).

[9] Engel, 246 B.R. at 790, quoting Black's Law Dictionary 139 (6th ed. 1990).

[10] Goldin v. Bartholow, 166 F.3d 710, 722 (5th Cir. 1999); In re Smyth, 242 B.R. 352, 360-61 (W.D. Tex. 1999)(standard met by lie to court).

[11] See In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985)(discussing Rule 9011 and 28 U.S.C. § 1927.

[12] In re Seeburg Products Corp., 215 B.R. 175 (Bankr. N.D. Ill. 1997).

[13] In re First City Bancorporation of Texas, Inc., 282 F.3d 864, 867 (5th Cir. 2002); In re 60 East 80th Street Equities, Inc., 218 F.3d 109, 116 (2d Cir. 2000) (bad faith and vexatiousness are evident from disparaging and unsubstantiated allegations impugning integrity of judge and trustee); In re Johnson, 236 B.R. 510, 519, 523 (D.D.C. 1999) (vituperative sanctions motion).

[14] In re Larry's Apartment, L.L.C., 249 F.3d 832, 837-38 (9th Cir. 2001).

[15] See Model Rule 3.1 (lawyer shall not bring or defend any action or assert or controvert an issue without non-frivolous basis for doing so including good faith argument for any position contrary to existing law); Model Rule 3.2 (make reasonable efforts to expedite litigation consistent with client interests); Model Rule 3.3 (lawyer shall not knowingly make false statement of material fact or law, fail to disclose material fact except as required by law, or fail to disclose legal authority in controlling jurisdiction); Model Rule 3.4 (lawyer shall not willfully obstruct another party's access to evidence; make a frivolous discovery request or fail to make reasonably diligent efforts to comply with proper discovery, allude to irrelevant material at trial, or obstruct others from giving relevant information to another party in most cases).

[16] Model Rule 1.2(a)("A lawyer shall abide by a client's decisions concerning the objectives of representation...."); Model Rule 1.4(b)("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); Model Rule 1.13(a)("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); Bankruptcy Rule 9001(5): Hansen, Jones & Leta P.C. v. Segal, 220 B.R. 434 (D. Utah 1998); In re Rivers, 167 B.R. 288 (Bankr. N.D. Ga. 1994)(attorney may not make decisions for client, even if DIP is incompetent); see In re Sky Valley, Inc., 135 B.R. 925 (Bankr. N.D. Ga. 1992)(incumbent on DIP counsel to advise other DIP professionals of their responsibilities under Code and disclosures necessary to fulfill those responsibilities).

[17] In re SIDCO, Inc., 173 B.R. 194 (E.D. Cal. 1994); In re Brennan, 187 B.R. 135 (Bankr. D.N.J. 1995); In re Whitney Place Partners, 147 B.R. 619 (Bankr. N.D. Ga. 1992); In re Stamford Color Photo, Inc., 98 B.R. 135 (Bankr. D. Conn. 1989); In re Nephi Rubber Products Corp., 120 B.R. 477 (Bankr. N.D. Ill. 1990).

[18] In re Berg, 268 B.R. 250 (Bankr. D. Mont. 2001).

[19] In re Dreiling, 233 B.R. 848 (Bankr. D. Colo. 1999)(lawyer is officer of the court, and statements to the court are virtually made under oath).

[20] See Matter of Little Creek Development Co., 779 F.2d 1068 (5th Cir. 1986).

[21] See FE&B v. Charter Technologies, Inc., 57 F.3d 1215 (3d Cir. 1995); In re JLM, Inc., 210 B.R. 19 (2d Cir. BAP 1997); In re Marathon Home Loans, 101 B.R. 216, 222 (Bankr. E.D. Cal. 1989)(counsel for trustee wrongfully carrying out "scorched earth attrition" policy in Chapter 7 case; sanctions awarded under Rule 9011 even though each document objectively reasonable and not frivolous).

[22] In re Humble Place Joint Venture, 936 F.2d 814 (5th Cir. 1991); In re Kendavis Industries International, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988); In re Downtown Investment Club III, 89 B.R. 59 (9th Cir. B.A.P. 1988); In re Global International Airways Corp., 82 B.R. 520 (Bankr. W.D. Mo. 1988); In re Golden Recipe Chicken, Inc., 109 B.R. 692 (Bankr. W.D. Pa. 1990)(DIP's counsel, using estate assets, secured release of shareholder's personal liability); In re Rusty Jones, Inc., 134 B.R. 321 (Bankr. N.D. Ill. 1991); In re Bonneville Pacific Corp., 147 B.R. 803 (Bankr. D. Utah 1992) rev'd. in part Hansen, Jones & Leta P.C. v. Segal, 220 B.R. 434 (D. Utah 1998).

[23] A DIP's attorney or other agent also may not purchase or self-deal in estate assets, even at a fair price. 18 U.S.C. § 154; In re Lowry Graphics, Inc., 86 B.R. 74 (Bankr. S.D. Tex. 1988); In re Q.P.S., Inc., 99 B.R. 843 (Bankr. W.D. Tenn. 1989)(DIP's accountant prohibited from buying estate car); In re Exennium, 23 B.R. 782 (9th Cir. BAP 1982), rev'd. on other grounds 715 F.2d 1401 (9th Cir.

1993)(former DIP counsel barred from purchasing lease from trustee after conversion).

[24] In re JLM, Inc., 210 B.R. 19 (2d Cir. BAP 1997)(explaining findings needed to justify fee denial on basis that services were not reasonably likely to benefit estate); In re Cent. Florida Metal Fabrication, Inc., 207 B.R. 742 (Bankr. N.D. Fla. 1997); In re Wilde Horse Enterprises, Inc., 136 B.R. 830 (Bankr. C.D. Cal. 1991); See In re Seeburg Products Corp., 215 B.R. 175 (Bankr. N.D. Ill. 1997)(attorney incompetently handled questionable chapter 11 case).

[25] In re Big Rivers Elec. Corp., 233 B.R. 768 (Bankr. W.D. Ky. 1999)

[26] 220 B.R. 434 (D. Utah 1998).

[27] 251 B.R. 250 (Bankr. D. Mass. 2000); see also ICM Notes, Ltd. v. Andrews & Kurth, L.L.P., 278 B.R. 117 (S.D. Tex. 2002).

[28] See, e.g. In re Casse, 198 F.3d 327 (2d Cir. 1999) (4th bankruptcy [chapter 13] dismissed as void when filed after injunction; extensive citations of cases from all circuits); In re Jolly, 143 B.R. 383 (E.D. Va. 1992), aff'd. Jolly v. Great Western Bank, 45 F.3d 426 (4th Cir. 1994) (seven filings by debtor or related parties over three years to forestall foreclosure; dismissal with prejudice upheld); Matter of Mitan, 168 B.R. 326 (Bankr. E.D. Mich. 1994) (five chapter 11 and 13 cases; dismissal with prejudice); Terio v. Great Western Bank, 166 B.R. 213 (S.D.N.Y. 1994), aff'd, 52 F.3d 310 (2d Cir. 1995) (warning that future filings without court permission were prohibited and could warrant sanctions); In re Stathatos, 163 B.R. 83 (N.D. Tex. 1993) (injunction of any future filings for 24 months upheld, where debtor filed 3 chapter 13 cases to hinder evictions).

[29] Jolly, 143 B.R. at 386-87.

[30] E.g. Casse, 198 F.3d at 336-39.

[31] Johnson v. Home State Bank, 111 S.Ct. 2150, 2156 (1991).

[32] Marsch, 36 F.3d at 828.

[33] In re Jones, 41 B.R. 263, 268 (Bankr. C.D. Cal. 1984)(sanctions against attorney who filed six petitions for sole purpose of delaying secured creditor)

[34] See In re Hutton Valley Farms, 251 B.R. 522, 524 (Bankr. W.D. Mo. 2000) (lawyer's claim that he was not familiar with "new debtor syndrome" cases not a defense to sanctions).

[35] In re McFarland, 17 B.R. 242, 245 (Bankr. N.D. Ga. 1982); Model Rule 1.2(d).

[36] See In re Maurice, 69 F.3d 830 (7th Cir. 1995); In re Lederman Enterprises, Inc., 997 F.2d 1321 (10th Cir. 1993)(counsel fees disallowed for bad faith chapter 11); In re Coones Ranch, Inc., 7 F.3d 740 (8th Cir. 1993)(same); In re Rainbow Magazine, Inc., 136 B.R. 545, 554 (9th Cir. BAP 1992)(caselaw re sanctions allocated between client and counsel according to their relative culpability); In re Villa Madrid, 110 B.R. 919 (9th Cir. BAP 1990) (attorney who knew or should have known petition was being filed in bad faith is liable for sanctions); In re Start the Engines, Inc., 219 B.R. 264, 271-72 (Bankr. C.D. Cal. 1998)($10,000 sanctions against attorney and client, jointly and severally).

[37] E.g. Fidelity Metals Corp. v. Risley, 175 P.2d 592, 594 (Cal. App. 1946) (statute is

"self executing law"); Porter v. Tempa Min. & Mill. Co., 93 P.2d 741, 745 (Nev. 1939) (upon revocation, corporation is dead for all purposes except that it has a right for a period of years after the date of forfeiture of its charter to dispose of its property).

[38] In re Prism Properties, Inc., 200 B.R. 43 (Bankr. D. Ariz. 1996).

[39] 200 B.R. at 47.

[40] In re Computer Dynamics, Inc., 252 B.R. 50, 61 (Bankr. E.D. Va. 1997); Singer Furniture Acquisition Corp. v. SSMC Inc. N.V., 254 B.R. 46, 52 (M.D. Fla. 2000).

[41] In re Smith, 234 B.R. 852 (Bankr. M.D. Ga. 1999); see also In re Jones, 41 B.R. 263 (Bankr. C.D. Cal. 1984).

[42] In re McNichols, 258 B.R. 892, 902 (Bankr. N.D. Ill. 2001).

[43] In re Primestone Investment Partners L.P., 272 B.R. 554 (D. Del. 2002) (totality of circumstances shows patently abusive case); In re Addon Corp., 231 B.R. 385, 389 (Bankr. N.D. Ga. 1999) (corporate debtor ineligible for discharge, no assets to protect, seeking only to delay eviction from terminated lease); In re Collins, 250 B.R. 645, 657 (Bankr. N.D. Ill. 2000); In re Hutton Valley Farms, 251 B.R. 522 (Bankr. W.D. Mo. 2000) (debtor formed just before filing to hold land and delay foreclosure).

[44] In re Singer Furniture Acquisition Corp., 261 B.R. 745, 750 (Bankr. M.D. Fla. 2001); In re Y.J. Sons & Co., Inc., 212 BR. 793 (D.N.J. 1997).

[45] In re Guaranteed Retirement, 112 B.R. 263 (Bankr. N.D. Ill. 1990) (analyzing standards for determining when "new debtor" case is inappropriate).

[46] In re Stolrow's Inc., 84 B.R. 167, 171 (Bankr. 9th Cir. 1989).

[47] In re SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999); In re Smith, 257 B.R. 344 (Bankr. N.D. Ala. 2001); In re Collins, 250 B.R. 645, 657 (Bankr. N.D. Ill. 2000).

[48] Dunes Hotel Associates v. Hyatt Corp., 245 B.R. 492 (D. S.C. 2000).

[49] See § I, supra, regarding applicability of Rule 9011 to counsel with respect to schedules; Model Rules 1.2, 1.4, 8.4; In re Davila, 210 B.R. 727 (Bankr. S.D. Tex. 1996). The attorney likewise must take care not to file a disclosure statement overlooking known assets, or a plan counsel knows the debtor cannot fund. In re Ligon, 50 B.R. 127, 132 (Bankr. M.D. Tenn. 1985)(sanctions against attorney); In re Jones, 41 B.R. 263 (Bankr. C.D. Cal. 1984)(same, chapter 13); In re Bonneville Pacific Corp., 147 B.R. 803 (Bankr. D. Utah 1992) rev'd in part, Hansen, Jones & Leta v. Segal, 220 B.R. 434 (D. Utah 1998)(all fees ordered disgorged where DIP counsel found to have aided misconduct by insiders, and disclosure statement and plan were wholly irreconcilable with examiner's report, schedules and monthly reports). Counsel has also been sanctioned for misrepresentations in a final report, certifying that all administrative claims had been paid without verifying it. In re Kliegl Bros., 238 B.R. 531 (Bankr. E.D.N.Y. 1999).

[50] In re Engel, 246 B.R. 784, 791 (Bankr. W.D. Pa. 2000)(citing 1 Norton Bankruptcy Law & Practice 2d § 27:25 at 27-76 (1998); In re Martinez, 22 B.R. 419, 421 (Bankr. D. N.M. 1982); In

re Stebel, 54 B.R. 199 (Bankr. D. Vt. 1985). See In re Cossey, 172 B.R. 597 (Bankr. E.D. Ark. 1994)(counsel sanctioned for not fully disclosing insurance settlement on schedules). The lawyer cannot delegate schedule preparation entirely to a paralegal. In re Hessinger & Assoc., 192 B.R. 211 (N.D. Cal. 1996); In re Davila, 210 B.R. 727 (Bankr. S.D. Tex. 1996).

[51] In re Kelley, 255 B.R. 783, 785 (Bankr. N.D. Ala. 2000) (lawyer did not ask about value of a judgment, when a simple inquiry of the state court attorney would have elicited the judgment amount and the existence of $5,000 held in the attorney's trust account to pay it).

[52] In re Engel, 246 B.R. 784, 791 (Bankr. W.D. Pa. 2000) (citing Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879 (1997) on meaning of "value").

[53] Engel, 246 B.R. at 791 (citing Model Rule 1.4(b)).

[54] Engel, 246 B.R. at 790 (lawyer was asked for an opinion letter on impact of bankruptcy on debtor's ability to transfer unscheduled asset).

[55] Id.

[56] Engel, 246 B.R. at 784 (citing Model Rule 5.1(c)(2), 5.3 (c)(2)).

[57] Engel, 246 B.R. at 786-87 (belated attempt to schedule asset at negative book value day before selling for $50,000, and scheduling land at $58,000 despite awareness of $132,000 appraisal); In re Woodward, 229 B.R. 468, 472 (Bankr. N.D. Okla. 1999) (state litigation scheduled at $50,000 exemption limit, despite knowledge of $100,000 settlement offer); In re Moix-McNutt, 220 B.R. 631 (E.D. Ark. 1998)(attorney deliberately omitted creditor to conceal debtor's ineligibility for chapter 13). Knowingly filing false schedules also is criminal. 18 U.S.C. § 152; United States v. Webster, 125 F.3d 1024 (7th Cir. 1997)(aiding and abetting false schedules); United States v. Franklin, 837 F.Supp. 916 (N.D. Ill. 1993) (attorney advised client to shield assets through fake gambling scheme); Coughlan v. United States, 147 F.2d 233 (8th Cir.), cert. denied 325 U.S. 888, reh. denied 326 U.S. 805 (1945)(predecessor statute, concealing property by not listing or scheduling); Ruby v. United States, 61 F.2d 617 (6th Cir. 1932), cert. denied 288 U.S. 617 (1933)(same).

[58] Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001)(list all causes of action that accrued prior to bankruptcy separately; "songrights" insufficient to schedule cause of action for prepetition royalties); In re Coastal Plains, Inc., 179 F.3d 197, 207-09 (5th Cir. 1999)(non-disclosure may judically estop estate from pursuing litigation); In re Guttman, 237 B.R. 643 (Bankr. E.D. Mich. 1999); In re Adeeb, 787 F.2d 1339 (9th Cir. 1986) (discharge denied unless full disclosure of fraudulent conveyance and recovery of property before filing).

[59] Louisiana World Exposition v. FDIC, 858 F.2d 233 (5th Cir. 1988); In re Microwave Products of America, Inc., 102 B.R. 666, 674 (Bankr. W.D. Tenn. 1989).

[60] In re R&R Associates of Hampton, 248 B.R. 1, 7-8 (Bankr. D. N.H. 2000).

[61] See In re Matthews, 154 B.R. 673 (Bankr. W.D. Tex. 1993); In re Huerta, 137 B.R. 356 (Bankr. C.D. Cal. 1992); In re Saturley, 131 B.R. 509 (Bankr. D. Me. 1991)(diligent and thorough effort to assist debtor in assembling, presenting and filing required date is part of counsel's job; expending large sums to test the accuracy and completeness through a title search is not appropriate).

[62] In re Matthews, 154 B.R. at 680 and In re Huerta, 137 B.R. at 379:

[63] In re Alderson, 114 B.R. 672, 680 (Bankr. D. S.D. 1990)(duty of DIP counsel to ascertain and present debtor's true financial condition).

[64] Rome v. Braunstein, 19 F.3d 54 (1st Cir. 1994); In re Hathaway Ranch Partnership, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990); Matter of Arlan's Department Stores, 615 F.2d 925, 932 (2d Cir. 1979); Halbert v. Yousif, 225 B.R. 336 (E.D. Mich. 1998).

[65] In re Park-Helena Corp., 63 F.3d 877 (9th Cir. 1995) cert. denied, 116 S. Ct. 712 (1996)(failure to provide details of retainer payment; strict compliance with disclosure rules required); In re Cook, 223 B.R. 782 (10th Cir. BAP 1998)(creditor representation disclosed, but not contingency fee agreement); In re LSS Supply, Inc., 247 B.R. 280 (Bankr. D. Ariz. 2000)(failure to disclose connections with corporate insiders and control and multiple capacities of insiders with debtor); In re Filene's Basement, Inc., 239 B.R. 845 (Bankr. D. Mass. 1999)(accounting firm's prior representation and Chinese Wall disclosed, but not identity of parties, nature of litigation, or other facts alerting court of potential problem); In re Filene's Basement, Inc., 239 B.R. 850 (Bankr. D. Mass. 1999)(law firm's description of litigation and extent of attorney-client relationship with creditor misleading); In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998)(extent of representation and client restrictions not disclosed); In re Southmark Corp., 181 B.R. 291 (Bankr. N.D. Tex. 1995) (affidavit disclosed fact of prior services for creditor unrelated to debtor but not type of services or substantial compensation by creditor); In re Brennan, 187 B.R. 135 (Bankr. D.N.J. 1995)(description of types of information needed); In re Amdura Corp., 139 B.R. 963 (Bankr. D. Colo. 1992)(disclosure of creditor as client insufficient due to not disclosing magnitude of relationship); but see In re Missouri Mining, Inc., 186 B.R. 946 (Bankr. W.D. Mo. 1995) (attorney promptly corrected erroneous disclosures and was not sanctioned); In re CIC Investment Corp., 175 B.R. 52 (9th Cir. BAP 1994) (court may excuse failure to disclose).

[66] In re United Companies Financial Corp., 241 B.R. 521 (Bankr. D.Del. 1999); In re Gulf Coast Orthopedic Center, 243 B.R. 135 (Bankr. M.D. Fla. 1999).

[67] Halbert v. Yousif, 225 B.R. 336, 351 (E.D. Mich. 1998); In re Smitty's Truck Stop, Inc., 210 B.R. 844, 849 (10th Cir. BAP 1997)..

[68] In re Lewis, 113 F.3d 1040, 1044-45 (9th Cir. 1997); In re Granite Partners, L.P., 219 B.R. 22 (Bankr. S.D.N.Y. 1998)(later-arising facts bearing on disinterestedness and adverse interest); In re Sauer, 222 B.R. 604 (8th Cir. BAP 1998); In re TJN, Inc., 194 B.R. 400 (Bankr. D.S.C. 1996)(disclose additional compensation received); In re Cropper Company, 35 B.R. 625 (Bankr.M.D. Ga. 1983)(after appointment, DIP began doing business with entity owned in part by associate in firm of DIP's attorney); In re Wingspread Corp., 152 B.R. 861 (Bankr. S.D.N.Y. 1993)(postpetition bank merger resulted in DIP counsel suing one subsidiary of bank while representing another).

[69] In re Kisseberth, 273 F.3d 714, 720-21 (6th Cir. 2001); In re Independent Engineering Co., Inc., 197 F.3d 13, 16-17 (1st Cir. 1999); In re Downs, 103 F.3d 472 (6th Cir. 1996); In re Park-Helena Corp., 63 F.3d 877, 880-81 (9th Cir. 1995) cert. denied, 116 S. Ct. 712 (1996)(strict compliance); In re Pierce, 809 F.2d 1356 (8th Cir. 1987); In re Arlans Departments Stores, Inc., 615 F.2d 925 (2d Cir. 1979).

[70] In re Fraga, 210 B.R. 812, 822 (9th Cir. BAP 1997); In re Basham, 208 B.R. 926,

932-33 (9th Cir. BAP 1997).

[71] In re Davila, 210 B.R. 727 (Bankr. S.D. Tex. 1996); see In re Bell, 212 B.R. 654, 657 (Bankr. E.D.Cal. 1997)(fee disclosure important in chapter 13 cases since court does not approve debtor's counsel's employment); see also In re Beesley, 212 B.R. 4 (Bankr. D. Me. 1997)(sanctioning chapter 7 attorney for charging in excess of written fee agreement).

[72] In re Keller Financial Services of Florida, Inc., 248 B.R. 859 (Bankr. M.D. Fla. 2000)(extensive analysis of § 329). Payments by the debtor's spouse must be disclosed as well. In re Greco, 246 B.R. 226 (Bankr. E.D. Pa. 2000).

[73] In re Pierce, 809 F.2d 1356 (8th Cir. 1987) (applying Rule 9011 to erroneous application to employ counsel); In re Dreiling, 233 B.R. 848, 870 (Bankr. D. Colo. 1999)(fundamental premise of our judicial system is that attorneys are officers of the court; when they address a judge it is virtually made under oath); Model Rule 3.1 and comment.

[74] See In re Thrifty Oil Co., 205 B.R. 1009, 1014 (Bankr. S.D. Cal. 1997) (accounting firm's conflict check inadequate); In re Perry, 194 B.R. 875 (E.D. Cal. 1996)(trustee's attorney failed to conflict check purchaser of estate assets -- represented by own firm); In re Michigan General Corp., 78 B.R. 479, 482 (Bankr. N.D. Tex. 1987)("Unfortunately, the burdens of the Bankruptcy Code are not met by a white heart. Negligence does not excuse the failure to disclose a possible conflict of interests.").

[75] In re Crook, 79 B.R. 475, 478-79 (9th Cir. BAP 1987). On the other hand, general bankruptcy counsel has been sanctioned for failure to disclose lack of disinterestedness of other estate professionals. Matter of CF Holding Corp., 164 B.R. 799, 808 (Bankr. D. Conn. 1994).

[76] In re Carlton House of Brockton, 1996 Bankr. LEXIS 170, 28 BCD 777 (Bankr. D. Mass. 1996)(creditors' committee counsel suspended from bankruptcy practice for one year due to false representations of disinterestedness).

[77] In re 1095 Commonwealth Corp., 236 B.R. 530, 534 (D. Mass. 1999).

[78] See United States v. Gellene, 182 F.3d 578 (7th Cir. 1999)(criminal conviction affirmed); In re Gellene, 676 N.Y.S.2d 161 (N.Y. App. Div. 1998)(disbarment); People v. Mills, 923 P.2d 116 (Colo. 1996)(attorney suspended from practice 60 days for failure to disclose and obtain bankruptcy court approval for attorneys' fees charged and collected).

[79] In re Roger J. Au & Son, Inc., 65 B.R. 322, 336 (Bankr. N.D. Ohio 1984), aff'd 64 B.R. 600 (N.D. Ohio 1986)(court does not render a moral judgment on the conduct of the attorneys, but requires their disqualification); In re Martin, 817 F.2d 175, 181 (1st Cir. 1987); In re Gray, 64 B.R. 505 (Bankr. E.D. Mich. 1986).

[80] In re Land, 943 F.2d 1265, 1267 (10th Cir. 1991); In re Kendavis Industries International, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988).

[81] FE & B v. Charter Technologies, Inc., 57 F.3d 1215 (3d Cir. 1995)In re Peoro, 793 F.2d 1048 (9th Cir. 1986); In re TCI, Ltd., 769 F.2d 441 (7th Cir. 1985); In re Excello Press, Inc., 967 F.2d 1109 (7th Cir. 1992)(before pursuing preference action, counsel ordinarily should examine whether any obvious defenses bar case, but no *per se* rule).

[82] In re Arkansas Communities, Inc., 827 F.2d 1219 (8th Cir. 1987); In re Edmonds, 110 B.R. 38 (D. Kan. 1989).

[83] In re 60 East 80th Street Equities, Inc., 218 F.3d 109 (2nd Cir. 2000)(frivolous appeal); In re Eisen, 14 F.3d 469 (9th Cir. 1994).

[84] In re Dubrowsky, 206 B.R. 30 (Bankr. E.D.N.Y. 1997); In re Bernard, 85 B.R. 864, 865 (Bankr. D. Colo. 1988).

[85] In re Rimsat, Ltd., 212 F.3d 1039 (7th Cir. 2000) (deposition taken in unproductive and harassing manner).

[86] See In re St. Johnsbury Trucking Co., Inc., 184 B.R. 446, 458 (Bankr. D. Vt. 1995), motion for stay denied, Winthrop, Stimson v. St. Johnsbury Co., 186 B.R. 53 (D. Vt. 1995); In re French Bourekas, Inc., 175 B.R. 517, 522 (Bankr. S.D.N.Y. 1994), sanctions order, 183 B.R. 695 (Bankr. S.D.N.Y. 1995); In re Marathon Home Loans, 101 B.R. 216, 222 (Bankr. S.D. Cal. 1989) (sanctioning harassment in the form of "a procedural war of scorched-earth attrition," even though each "motion or paper may be objectively reasonable and, thus, not frivolous"). See also In re Hensley, 249 B.R. 318 (Bankr. W.D. Okla. 2000)(intentionally including language in chapter 13 plans in hope that creditors will fail to object and be bound by res judicata violates counsel's ethical obligations).

[87] In re Computer Dynamics, Inc., 252 B.R. 50, 61 (Bankr. E.D. Va. 1997).

[88] In re Melendez, 235 B.R. 173 (Bankr. D. Mass. 1999); In re Vargas, 257 B.R. 157 (Bankr. D. N.J. 2001).

[89] CFTC v. Weintraub, 471 U.S. 343, 355, 105 S. Ct. 1986, 1994 (1985); Pepper v. Litton, 308 U.S. 295, 306 (1939); In re Perez, 30 F.3d 1209 (9th Cir. 1994); Hansen, Jones & Leta P.C. v. Segal, 220 B.R. 434 (D. Utah 1998); In re JLM, Inc., 210 B.R. 19 (2d Cir. BAP 1997); In re Consupak, Inc., 87 B.R. 529, 549 (Bankr. N.D. Ill. 1988).

[90] In re Whitney Place Partners, 123 B.R. 117, 124 (Bankr. N.D. Ga. 1992); See also Model Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); Model Rule 1.2(e)(When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.").

[91] Model Rule 1.13.

[92] In re Perez, 30 F.3d 1209, 1219 (9th Cir. 1994); In re Berg, 268 B.R. 250, 262 (Bankr. D. Mont. 2001); In re Start the Engines, Inc., 219 B.R. 264, 271 (Bankr. C.D. Cal. 1998). In the terminology of the Model Rules, if a client is insistent on an action that "is clearly a violation of law and is likely to result in substantial injury to the organization," the lawyer may withdraw. Model Rule 1.13; see also Model Rule 1.16; but see In re SIDCO, Inc., 173 B.R. 194, 196 (E.D. Cal. 1994)(DIP attorney's fiduciary duty is to DIP client, not creditors and shareholders whose interests may be adverse to DIP).

[93] In re JLM, Inc., 210 B.R. 19, 26 (2d Cir. BAP 1997); In re Brennan, 187 B.R. 135 (Bankr. D.N.J. 1995)(in serious cases such as conversion of estate property, the professionals will sometimes be obligated to report the debtor's breach to others); Model Rule 1.6 Comment; ABA Formal

Opinion 92-366 (August 8, 1992)(duty of "noisy withdrawal" from representation).

[94] Model Rules 1.2, 1.13, 2.1, 3.1.

[95] See, e.g., In re Humble Place Joint Venture, 936 F.2d 814, 819 (5th Cir. 1991); In re Gregory, 214 B.R. 570, 576 (S.D. Tex. 1997).

[96] Model Rule 1.4(b).

[97] Model Rules 1.2, 8.4.

[98] Model Rule 4.1. Disclosure may be prohibited by the obligation to preserve client confidences set forth in Model Rule 1.6. In that case counsel must withdraw instead of countenancing an improper course of action. Model Rule 1.16(b). See In re Wilde Horse Enterprises, Inc., 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991).

[99] Model Rules 2.3, 4.3 and official comments.

[100] Model Rules 1.6, 3.3; see United States v. Cherek, 734 F.2d 1248, 1252-53 (7th Cir. 1984) cert. denied 105 S. Ct. 2016 (1984)(criminal liability under 18 U.S.C. § 152; debtor required to disclose existence of assets even if debtor's ownership status is questionable); United States v. Kaldenberg, 429 F.2d 161 (9th Cir. 1970) cert. denied 400 U.S. 929 (1970)(debtor convicted of failure to report rentals from estate property).

[101] Model Rule 1.2. See U.S. v. Goodstein, 883 F.2d 1362, 1371 (7th Cir. 1989) (lawyer guilty of bankruptcy fraud for role in unauthorized postpetition transfers); U.S. v. Dolan, 120 F.3d 856 (8th Cir. 1997)(counsel guilty of bankruptcy fraud, conspiracy, aiding and abetting client's bankruptcy fraud); U.S. v. Rosen, 130 F.3d 5 (1st Cir. 1997)(counsel guilty of mail fraud in deceiving bankruptcy court with undisclosed side deal in connection with estate asset sale).

[102] 11 U.S.C. § 727; 18 U.S.C. §§ 152, 1621; 11 U.S.C. § 1104(a)(1); In re Olson, 916 F.2d 481, 484 (8th Cir. 1990)(denial discharge for failure to disclose interest in asset nominally owned by spouse and of questionable value on schedules); In re Calder, 907 F.2d 953, 955 (10th Cir. 1990) (denial discharge for failures to disclose assets on schedules); United States v. Ellis, 50 F.3d 519 (7th Cir.) cert. denied, 516 U.S. 849 (1995) (conviction for false statement about prior bankruptcies on petition).

[103] Model Rules 1.6(c), 3.3; United States v. Ballard, 779 F.2d 287, 292-93 (5th Cir.) cert. denied, 106 S.Ct. 1519 (1986); 11 U.S.C. § 542(e).

[104] Model Rule 3.3 Comment; see Model Rule 1.13(b) regarding procedures when the client is an organization; Bankruptcy Rule 1009.

[105] Model Rules 1.6, 1.16, 3.3; In re Gregory, 214 B.R. 570, 576 (S.D. Tex. 1997) (duty to disclose client defalcation); In re Swansea Consolidated Resources, Inc., 155 B.R. 28, 38 n. 14 (Bankr. D. R.I. 1993)(as an officer of the court, DIP counsel "had absolutely no choice but to disclose" unauthorized diversion of $64,000 of DIP funds to a foreign bank); see also In re Brennan, 187 B.R. 135 (Bankr. D.N.J. 1995)(in serious cases such as conversion of estate property, the professionals will sometimes be obligated to report the debtor's breach to others).

[106] Model Rule 1.6 Comment; see In re Saturley, 131 B.R. 509, 519 (Bankr. D. Me. 1991)(inform trustee that schedules are incomplete if concerns about client's candor, to prompt trustee investigation); In re Matthews, 154 B.R. 673, 680-81 (Bankr. W.D. Tex. 1993)(same; alert U.S. Trustee, court, or another interested party that schedules are incomplete or inaccurate; failure to withdraw contributed to debtor's dishonesty by not setting up early alarm that something was amiss); ABA Formal Opinion 92-366 (Aug. 8, 1992)(ethical obligation of "noisy withdrawal").

[107] Model Rule 1.16; In re Alderson, 114 B.R. 672, 680-81 (Bankr. D. S.D. 1990).

[108] Model Rule 1.16; In re Meyers, 120 B.R. 751, 752 (Bankr. S.D.N.Y. 1990) and cases cited therein.

[109] Model Rule 1.16(d). The court may order turnover of the attorney's files regardless of any charging lien rights. 11 U.S.C. § 542(e).

[110] In re Gioioso, 979 F.2d 956, 960 (3d Cir. 1992)(the concurrence discusses whether bankruptcy courts also have inherent power to sanction misconduct under Chambers v. NASCO, 111 S.Ct. 2123 (1991)). Changes to Federal Rule of Civil Procedure 11 are not incorporated by reference in Bankruptcy Rule 9011. In re Dubrowsky, 206 B.R. 30, 35 (Bankr. E.D.N.Y. 1997).

[111] Rule 9011(c). There is no safe harbor for filing a bankruptcy petition violating rule 9011 standards, however. Id. See In re Russ, 187 F.3d 978, 981 (8th Cir. 1999) (omissions from schedules so serious that bankruptcy court sanctions would have been upheld, but court did not abuse discretion in denying sanctions either).

[112] Rule 9011(c)(1)(A); In re Collins, 250 B.R. 645 (Bankr. N.D. Ill. 2000).

[113] In re McNichols, 258 B.R. 892, 902 (Bankr. N.D. Ill. 2001).

[114] FE&B v. Charter Technologies, Inc., 57 F.3d 1215 (3d Cir. 1995) (disallowance of all fees); Dreamlite Holdings Ltd. v. Kraser, 890 F.2d 1147 (Fed. Cir. 1989)(refusing to accept further filings on behalf of clients or their attorney until award of fees and double costs paid in full and satisfactory proof furnished to court); In re Salter & Co., Ltd., 99 B.R. 327 (E.D. La. 1989)(fees and double costs); In re Beugen, 99 B.R. 961 (9th Cir. BAP 1989)(same); In re Start the Engines, Inc., 219 B.R. 264 (Bankr. C.D. Cal. 1998)($100,000 awarded against attorney and client, jointly and severally).

[115] Bankruptcy Rule 9011(c)(2).

[116] In re Kendavis Industries International, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988).

[117] In re Addon Corp., 231 B.R. 385, 391 (Bankr. N.D. Ga. 1999).

[118] In re Film Ventures Intern., Inc., 89 B.R. 80, 86 (9th Cir. BAP 1988).

[119] In re Smith, 257 B.R. 344, 353 (Bankr. N.D. Ala. 2001).

[120] In re Y.J. Sons & Co., Inc., 212 B.R. 793, 806-07 (D. N.J. 1997).

[121] Bankruptcy Rule 9011(c); Goldin v. Bartholow, 166 F.3d 710, 722 (5th Cir. 1999)

(court's mention of cost-shifting was insufficient notice of personal liability for sanctions); In re Stein, 127 F.3d 292, 295 (2nd Cir. 1997) (notice and opportunity to be heard, but not full evidentiary hearing); In re Big Rapids Mall Associates, 98 F.3d 926, 929-30 (6th Cir. 1996)(briefs with opportunity for affidavits sufficient); FE&B v. Charter Technologies, Inc., 57 F.3d 1215 (3d Cir. 1995) (sanction motion was sufficient notice of conduct at issue). The explanation presented may justify a reversal of an initial inclination to award sanctions. In re Whitney Place Partners, 123 B.R. 117 (Bankr. N.D. Ga. 1992)(sanctions directed and OSC set); 147 B.R. 619 (Bankr. N.D. Ga. 1992) (evidence showed errors to be the result of counsel's lack of bankruptcy expertise; sanctions not imposed).

[122] In re 60 East 80th Street Equities, Inc., 218 F.3d 109, 117 (2nd Cir. 2000); In re Mahendra, 131 F.3d 750, 760 (8th Cir. 1997) (notice and opportunity to respond re sanctions on appeal); see In re Rimsat, Ltd., 212 F.3d 1039, 1046 (7th Cir. 2000) (court may cite perceptions of general litigation strategy as background and context for sanctions ruling without providing particularized notice).

[123] In re Gioioso, 979 F.2d 956 (3d Cir. 1992); In re Lane, 991 F.2d 105 (4th Cir. 1993)(factors to be considered in determining sanctions); In re Rainbow Magazine, Inc., 136 B.R. 545 (9th Cir. BAP 1992); In re Omega Trust, 110 B.R. 665 (Bankr. S.D.N.Y. 1990), aff'd in part, remanded in part, 120 B.R. 265 (S.D.N.Y. 1990)(detailed discussion of Rule 9011 types of sanctions and factors that may be considered in determining which sanctions to impose).

[124] In re Engel, 246 B.R. 784 (Bankr. M.D. Pa. 2000); In re MPM Enterprises, Inc., 231 B.R. 500, 505 (E.D.N.Y. 1999).

[125] Engel, 246 B.R. at 794 (citing authorities); In re Highgate Equities, Ltd., 279 F.3d 148, 152 (2nd Cir. 2002); FE&B v. Charter Technologies, Inc., 57 F.3d 1215 (3d Cir. 1995) (notice of 9011 sanctions sufficient to impose sanctions for same conduct under inherent power of court).

[126] In re Hancock, 192 F.3d 1083, 1086 (7th Cir. 1999).

[127] In re Oak Grove Village, Ltd., 90 B.R. 246, 249 (Bankr. W.D. Tex. 1988).

[128] In re Hall's Motor Transit Co., 889 F.2d 520, 523 (3d Cir. 1989) (FRAP 38); Matter of McGuirt, 879 F.2d 182, 184 (5th Cir. 1989) (same); Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077 (9th Cir. 1989); Dreamlite Holdings Ltd. v. Kraser, 890 F.2d 1147 (Fed. Cir. 1989); White v. General Motors, 908 F.2d at 680; but see In re Marathon Home Loans, 101 B.R. 216, 222 (Bankr. S.D. Cal. 1989)(each filing not frivolous, but sanctionable as part of persistent pattern of abusive litigation activity).

[129] In re Big Rapids Mall Associates, 98 F.3d 926, 930-31 (6th Cir. 1996); In re Highgate Equities, Ltd., 279 F.3d 148, 154-44 (2nd Cir. 2002) (letter).

[130] In re Johnson, 236 B.R. 510, 519, 523 (D.D.C. 1999).

[131] In re Omega Trust, 110 B.R. 665, 673-74 (Bankr. S.D.N.Y. 1990) (extensive list of mitigating and aggravating factors, and supporting citations).

[132] Omega Trust, 110 B.R. at 673-74 (citing numerous cases, and a list of alternative sanctions); see also In re Placid Oil Co., 158 B.R. 404 (N.D. Tex. 1993)(fee disgorgement and disbarment for violation of court orders); In re Maurice, 167 B.R. 114, 128 (Bankr. N.D. Ill. 1994) (complete 16 hours of CLE in bankruptcy and 8 hours in legal ethics); In re Pearson, 108 B.R. 804 (Bankr. S.D. Fla. 1989) (9 hours bankruptcy and 3 hours ethics CLE).

[133] In re Moix-McNutt, 220 B.R. 631, 637 (E.D. Ark. 1998) (citing cases); In re MPM Enterprises, Inc., 231 B.R. 500, 504 (E.D.N.Y. 1999) (citing cases); See In re Smith, 257 B.R. 344, 353 (Bankr. N.D. Ala. 2001)(any further sanctionable conduct will result in suspension of practice before the bankruptcy court); In re Brantley, 84 B.R. 508, 510 (Bankr. S.D. Ohio 1988) (same, from repeated defects in schedules); see Landscape Properties,Inc. v. Whisenhunt, 127 F.3d 678, 685 (8th Cir. 1997) (district court considering bankruptcy sanctions appeal referred matter to other district judges to determine whether disciplinary actions should be taken against appellant attorney).

[134] In re Rimsat, Ltd., 212 F.3d 1039, 1043 (7th Cir. 2000); D.H. Overmyer Co., Inc. v. Robson, 750 F.2d 31, 33 (6th Cir. 1984).

[135] In re Maurice, 73 F.3d 124, 126 (7th Cir. 1995)(suspension from all federal courts in circuit pending compliance with sanctions payment); In re 60 East 80th St. Equities, Inc., 218 B.3d 109, 120 (2d Cir. 2000)(suspension until sanctions paid); In re Hancock, 192 F.3d 1083, 1086 (7th Cir. 1999) (same); Moix-McNutt, 220 B.R. at 637 (4 years); In re Heard, 106 B.R. 481, 484 (Bankr. N.D. Ohio 1989)(1 year); In re Nesom, 76 B.R. 101, 102 (Bankr. N.D. Tex. 1987) (60 days); In re Assaf, 119 B.R. 465, 467 (E.D. Pa. 1990)(until fees paid); In re Woodward, 229 B.R. 468, 476-77 (Bankr. N.D. Okla. 1999)(OSC to consider suspension, plus immediate suspension if disgorgement order not met); In re Carlton House of Brockton, Inc., 28 BCD 777 (Bankr. D. Mass. 1996) (1 year).

[136] In re Statmore, 176 B.R. 512, 515 (D. Neb. 1984)(court will consider lifting suspension upon proof of payments); In re Lowe, 18 B.R. 26, 27 (Bankr. N.D. Ga. 1982) (permanent suspension pending further order of the court).

[137] In re Maurice, 167 B.R. 114 (Bankr. N.D. Ill. 1994); In re 60 East 80th St. Equities, Inc., 218 F.3d 109, 121 (2d Cir. 2000); In re Clark, 223 F.3d 859, 865 (8th Cir. 2000);In re Davila, 210 B.R. 727 (Bankr. S.D. Tex. 1996).

[138] E.g. Mississippi Bar v. Shah, 749 So.2d 1047, 1048-50 (Miss. 1999); In re Caranchini, 160 F.3d 420, 422 (8th Cir. 1998).

[139] Caranchini, 160 F.3d at 424.

[140] United States v. Webster, 125 F.3d 1024, 1028 (7th Cir. 1997), cert. denied, 522 U.S. 1051 (1998); United States v. Dolan, 120 F.3d 856 (8th Cir. 1997); United States v. Cherek, 734 F.2d 1248, 1254 (7th Cir. 1984), cert. denied, 471 U.S. 1014 (1985); United States v. Franklin, 837 F.Supp. 916 (N.D. Ill. 1993) (plea to obstructing justice).

[141] Webster, 125 F.3d at 1036

[142] United States v. Gellene, 182 F.3d 578 (7th Cir. 1998)

[143] In re Maurice, 69 F.3d 830, 834 (7th Cir. 1995).

[144] Maurice, 69 F.3d at 834; In re Ludwick, 185 B.R. 238, 247 (Bankr. W.D. Mich. 1995).

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"No Talk" Clause Not Read To Bar Target From Considering New Bid

Rosenman & Colin LLP

The Delaware Chancery Court declined to read a "no talk" provision in a merger agreement to bar the target company from considering a competing offer. The ruling marks the second time in less than a month that the Delaware Chancery Court has looked with disfavor on such a provision. In the most recent ruling (ACE Ltd. v. Capital Re Corp., Del.Ch., Civil Action No. 17488, 10/25/99), the Court refused to bar Capital Re Corp. from terminating its merger agreement with ACE Ltd. in order to consider a competing proposal. ACE had sought a temporary restraining order blocking termination of the agreement. The merger agreement contained a provision that restricted Capital Re from talking to a third party in connection with an unsolicited, bona fide transaction proposal unless, among other things, the Capital Re board concluded in good faith, based on its outside counsel"s advice, that participating in such discussions is required for the board not to breach its fiduciary obligations to shareholders under Delaware law. Although counsel to Capital Re did not state that the board was "required" to discuss a competing offer, the Court found that the merger agreement did not preclude the board from concluding, even if its outside counsel equivocated, that such negotiations are mandated as a matter of fiduciary duty. The Court said that if the "no talk" provision in fact required that the Capital Re board refrain from discussing another offer unless it received a lawyer"s opinion that such discussions were "required," the no talk provision probably would be found invalid. *(Securities Regulation & Law Report*, 10/29/99, p. 1433)

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Excluding Third-Party Beneficiaries from Merger Agreements

Bodman, Longley & Dahling LLP
By James A. Smith

Synopsis

Often, in a merger-acquisition negotiated by two companies, the target company's shareholders receive a premium price for their shares. In the ordinary sense, the target's shareholders are "beneficiaries" of the merger agreement. If the agreement is clear on the point, however, the target company's shareholders are not third party beneficiaries and cannot sue the buyer for breach. Let's look at a case study.

The Merger Agreement

Acme and Beta executed a definitive merger agreement. All shares of Beta were to be redeemed for cash. The price was tied to the market price of Acme shares, and included a premium for Beta's shareholders - at least 25% over the last market quote for Beta shares before the deal was announced.

The Acme-Beta Merger Agreement contained "General Provisions." These "boilerplate" clauses were in the first draft of the agreement and were never revised during negotiations. They included such prosaic matters as addresses for notices, choice of governing law and counterpart execution. The General Provisions also included this clause:

> "*Entire Agreement; No Third Party Beneficiaries.* This Agreement is the entire agreement between the Parties concerning its subject matter, supersedes all prior agreements and understandings, whether or not written, and is not intended to confer upon any person other than the Parties any rights or remedies hereunder."

Termination

On the eve of the merger, Acme terminated, claiming a substantial change in Beta's circumstances had occurred. The next day, Beta's share price fell back to premerger levels and no other buyer was interested in matching Acme's offer. Some angry Beta shareholders consulted a well-known class-action securities lawyer, Matthew Browning, hoping to sue Acme for the price premium they lost. They

asked him to work on a contingency fee. Browning studied the merger agreement, especially the General Provisions, then shook his head.

"I tried to make a claim like this once," he told the shareholders, "but I won't try again. You won't get to trial, so you won't have much leverage for a settlement."

Browning explained: "The problem is, this merger agreement is between Acme and Beta, and you shareholders are not parties to the agreement. Normally, only a party to a contract can sue. Sometimes, you can sue as a third party beneficiary, but this agreement specifies that there are no third party beneficiaries. I know it sounds funny, but you can't sue for breach, even if there was a breach. I wouldn't take this case on a contingency and I wouldn't advise you to spend money suing Acme."

One of the disappointed shareholders was Harold Nelson, president of his own company. Nelson called his lawyer, Nancy Tatum, and asked her if Browning was right. Nancy asked for a copy of the Acme-Beta merger agreement and other papers and told Nelson she would review the cases and send him a memo.

"I can't afford any memos," Nelson protested. "Just call me when you know whether we can sue." Nancy Tatum set to work in the library, and here is what she found.

Excluding Third Parties

Nancy noted first that the merger agreement was governed by the law of Delaware, Acme's state of incorporation. Delaware's common law of contracts holds that no one can be a third party beneficiary of a contract unless it is apparent on the face of the contract that the parties to the contract intended to confer that status on others. *Insurance Company of North America v. Waterhouse*, 424 A.2d 675, 678 (Del. Sup. 1980). Michigan follows the same rule, by statute. MCL 600.1405, MSA 27A.1405.

> "The courts use an objective standard to determine whether a plaintiff is a third-party beneficiary under the statute. The contract itself reveals the parties' intentions. The parties' motives and subjective intentions are irrelevant in determining whether a plaintiff is a third-party beneficiary. * * * " *Frick v. Patrick*, 165 Mich. App. 689, 694, *lv. den.*, 431 Mich 872 (1988).

See also, Rieth-Riley Construction Co. v. Dept. of Transportation, 136 Mich. App. 425 (1984), *lv. den.*, 422 Mich. 911 (1985).

So, Nancy knew what it takes to convince a court that someone is a third party beneficiary. It must be objectively clear from the terms of the contract itself. What about a contract which says that *nobody* is a third party beneficiary, even when the whole point of the agreement was to benefit an obvious group?

Nancy found few cases, but they supported Browning"s advice to the Beta shareholders. The Oklahoma Court of Appeals addressed this question in *Cities Service Company v. Gulf Oil Corp.*, 797 P.2d 1009 (Okla. App. 1990), *reh. den.*, 5/29/90; *cert. den.*, *9/18/90* (Okla. S. Ct.). Gulf Oil had agreed to acquire Cities Service, but canceled the deal when the Federal Trade Commission obtained a temporary restraining order enjoining the merger. Cities Service sued Gulf for breach, joined by two shareholders, who contended that they were third party beneficiaries of the contract.

The Cities Service - Gulf merger agreement, §10.8, provided:

> "Section 10.8 Miscellaneous. This agreement . . . (i) constitutes the entire agreement and

> supersedes all other prior agreements and understandings, both written and oral, among the parties, or any of them, with respect to the subject matter here [*sic*]; (ii) is not intended to confer upon any other person any rights or remedies hereunder; . . ." 797 P.2d at 1011.

The trial court dismissed *both* Cities Service's claim for the premium its shareholders would have received and the shareholders' direct claims for the premium. The Oklahoma Appeals Court affirmed, ruling:

> "* * * Because of Section 10.8 of the merger agreement, we hold that the parties to said agreement (Cities, Gulf and GOCA [a Gulf subsidiary]) did not intend to confer upon the shareholders a right to receive performance by the promisor, Gulf, and therefore the shareholders were not in the legal sense third-party beneficiaries of the merger agreement." 797 P. 2d at 1012.

The Cities Service shareholders argued that they were the ones who were to receive the premium price offered by Gulf, so the "no third parties" clause could not have been intended to apply to them. The Oklahoma court turned this intuition around: *because* the shareholders were the "only class of potential third-party beneficiaries evident on the face of the contract", ibid., and the corporate parties took pains to exclude third party beneficiaries, this clause *must* have been intended to exclude the shareholders.

Similar results have been reached in other courts. Disappointed Cities Service shareholders also filed class actions in New York. *In re Gulf Oil/Cities Service Tender Offer Litigation*, 725 F. Supp. 712 (SDNY 1989). Applying Delaware law, the District Court ruled that "any other person" was clear and unambiguous language which excluded the shareholders from any right to sue. In an unreported decision dealing with another failed merger, the Ohio Court of Appeals refused to allow shareholders to sue when a merger agreement excluded third party beneficiaries. *Matheny v. Ohio Bancorp*, 1994 Ohio App Lexis 6007.

Corbin on Contracts, §776, at 7 (Supp., 1971) expresses a similar view:

> "[I]f two contracting parties expressly provide that some third party who will be benefitted by performance shall have no legally enforceable right, the courts should effectuate the express intent by denying the third party any remedy."

The *Restatement of Contracts 2d*, §302, observes that persons, who otherwise might meet the tests for third party beneficiary status, will be denied the right to sue when it is "otherwise agreed between promisor and promisee."

Her research done, Nancy Tatum called Mr. Nelson and told him that Matthew Browning gave him good advice. "Browning wouldn"t take the case on a contingency because he knew he"d never get a fee," she said. "You would be wasting your money if you paid a lawyer to sue, and Browning was right to say so."

"Why didn"t the Board insist that shareholders like me be included in the agreement?" Nelson asked. "Isn"t that their job?"

Nancy explained: "It"s the directors' job to get the best deal they can for the shareholders, but they can"t do the impossible. I believe Acme never would have signed the agreement without that clause. I certainly wouldn"t let you sign one."

"I bet the board had their own sweet deal to sell their shares," Nelson fumed.

"Yes, they did sign lockup agreements", Nancy replied, "but that won"t give them the right to sue, either. Acme"s lawyers did a good job on the lockups, too."

RELATED AGREEMENTS

"Lockup" agreements, made between the acquiring company and shareholders of the target, frequently accompany merger agreements. The target's key shareholders agree to vote for the merger and to tender their shares. Usually, there is no separate agreement to purchase them; the lockup is executed to induce the acquiror to enter into the merger agreement. Another form of "extrinsic" agreement is the tender offer made to other target shareholders, under which the acquiror offers to purchase shares, subject to the conditions of the merger agreement.

If the merger agreement and all related agreements have their own integration and "no third party" clauses, the courts will not merge the agreements into a "super contract" under which the target shareholders could sue. Lockup agreements can define their parties to include only the acquiror and the signing shareholder, thus excluding the target company and its other shareholders as parties. They also can exclude third party beneficiaries. Both courts which decided the Gulf Oil/Cities Service disputes ruled that the existence of such other agreements did not make target shareholders parties to or third party beneficiaries of the merger agreement.

> "Faced with § 10.8's preclusive effect on their third-party beneficiary argument, plaintiffs argue that § 10.8 does not apply to shareholders because it includes 'instruments . . . referred in the Agreement" and the Offer to Purchase was referred to in the Merger agreement. * * * Defendants correctly respond that the language 'instruments . . . referred in the Agreement' is limited to those agreements 'among the parties' and, since even the shareholders agree they were not 'parties' to the Merger Agreement, plaintiffs' imaginative reading of § 10.8 fails." *Gulf Oil/Cities Service, supra,* 725 F. Supp. at 733-734.

See also Cities Service Co. v. Gulf Oil Co, supra, 797 P. 2d at 1012 (shareholders not parties to merger agreement by virtue of tender agreement).

All agreements used in connection with the merger must be reviewed carefully to determine whether they could be read together to confer rights on ancillary parties. If drawn carefully, they will not. An example of problems created by lack of "boilerplate" is found in the litigation over the failed acquisition of ICO, Inc. *Bush et al. v. Brunswick Corp. et al.,* 783 S.W.2d 724 (Ct. App. Tex. 1989), *reh. den.* (2/13/90); *Brunswick Corp. et al. v. Bush et al.,* 829 S.W.2d 352 (Tex. App. 1992).

Brunswick agreed to acquire ICO, Inc., through merger with a new Brunswick subsidiary, "ICO Transitory". Brunswick also made lockup agreements with seven ICO shareholders, who held 51% of ICO's stock. The merger agreement provided that it was "not intended to confer upon any other person any rights or remedies". It also "superseded all other prior oral agreements and understandings between the parties", but did not provide that it was the "entire agreement" between the parties. The lockup agreements lacked "entire agreement" and "supersedes other agreements" clauses, and did not exclude third parties.

When trouble developed, ICO sued, alleging anticipatory breach by Brunswick. The seven shareholders who had made lockup agreements petitioned to intervene, claiming third party beneficiary status. The Texas Court of Appeals ruled that the seven insiders could intervene, because the merger agreement had no "entire agreement" clause. The Court read the lockup agreements together with the merger agreement, concluding that the shareholders were intended beneficiaries of the merger agreement and

could sue for its breach. The court read "any other person" as meaning persons other than the necessary participants in the merger. The court observed that the parties could have used language such as "no person who is not a party to the Merger Agreement", if that was what they meant. 783 S.W.2d at 730.

In its second opinion, the Texas court held that the seven insiders could sue for themselves, but not for a class of all ICO shareholders, because the shareholders who had not signed lockups were not necessary parties to the merger. 829 S.W.2d 352. This anomalous result probably could have been avoided if both merger and lockup agreements had used all of the necessary "boilerplate".

Nancy Tatum explained to Nelson that Acme had been careful to include all the necessary clauses in both the merger and the lockup agreements. Nelson listened to this explanation quietly, then asked: "Do we have clauses like these in our contracts?"

"Yes, in the contracts I've prepared", Nancy replied. "The only time I don"t use a standard "no third parties" clause is when you really mean to create a third party beneficiary. There were some third party beneficiaries in one deal, when you agreed to honor agreements with employees of the company you bought. But we made sure the employees were the only third party beneficiaries, and only as to those agreements."

"Thanks, Nancy. I guess I"m getting good advice."

Nelson was right. He was getting good advice, both on his own company"s contracts and on the contract between Acme and Beta. Using a no third party beneficiary clause is easy, seldom controversial in negotiating a deal, and can be crucial to defending a claim of breach. Coupled with integration and supersession clauses, it will do the job intended by the parties.

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This article originally appeared in the June 1999 edition of the *Michigan Bar Journal*.

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In this issue: Peter Cameron, Head of M&A and Corporations and Securities Panel member, and David Noakes, solicitor currently on secondment to the Panel, discuss the implications of a new draft policy on break fees and other lock-up devices.

- Lock-up devices
- The policy
- Break fees
- No-shop and no-talk agreements
- Pre-emptive rights
- Conclusion

Takeovers panel - break fees and other lock-up devices

The Corporations and Securities Panel (the Panel) has released for public comment a draft policy on break fees and other lock-up devices in the context of Australian takeovers.

Lock-up devices

Lock-up devices are agreements intended to facilitate proposals for change of control. The different types of lock-up devices examined by the Panel are:

- break fee agreements;
- no-shop and no-talk agreements; and
- pre-emptive rights agreements.

The policy

The Panel's policy on lock-up devices is directed to ensuring, consistently with the *Corporations Act*, that the acquisition of control of companies occurs in an efficient, competitive and informed market. A lock-up device should not confer unequal benefits between shareholders and should not be a material disincentive to the prospect of the emergence of a rival offer.

The Panel will consider the following in determining whether

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a lock-up device constitutes unacceptable circumstances:

- In the case of a break fee, does it consist only of the reimbursement of reasonable internal and external costs (or, where appropriate, opportunity costs) and is it subject to an appropriate dollar or percentage cap?
- Is there full disclosure of the agreement in the documentation?
- Is the purpose or likely effect to induce or maintain a bid?
- Does the arrangement reduce competition in the market for control?
- Does the target board consider it to be in the best interests of the shareholders to promote a bid?
- Does the target board consider that the bid which the device induces offers shareholders exceptional value?
- Does the arrangement adversely affect the amount or distribution of benefits accruing to shareholders?
- Is the period for which the target board binds itself reasonable?
- Is the target board explicitly allowed to fulfil its obligations to its shareholders?
- Is the target board excluded from considering a rival bid or dealing with a rival bidder, especially if the rival bid is on better terms?

Break fees

Break fees typically provide compensation to a bidder for its outgoings time and effort if an event occurs which prevents the bid from completing. Obligations to pay a break fee are normally triggered by:

- the emergence of a higher competing offer by a third party who acquires control;
- actions by the target which cause the bid to fail (such as promoting alternative proposals or triggering bid conditions).

The Panel's draft policy indicates that break fees will not normally constitute unacceptable circumstances where the disappointed bidder is paid out-of-pocket expenses in connection with the transaction. These will normally constitute reasonable reimbursement of third party outgoings and some internal costs. In certain circumstances, the Panel will also allow the payment of compensation for executive time spent on the transaction and the opportunity cost of diversion of the bidder's attention from its own business or the pursuit of other acquisition opportunities. Opportunity costs such as these are typically difficult to define and are almost impossible to quantify. It will ordinarily be harder to make out a case for opportunity costs and these will need to be justified in the circumstances of each individual case brought before a sitting Panel.

Break fee payments normally will be limited to 1% of the market capitalisation of the target company at the time that the bid is announced. However, this is only a guideline figure and will vary depending on the size of the transaction. The Panel is less likely to countenance a figure in excess of the 1% guideline, except perhaps in deals where the target's market capitalisation is very low. The draft policy notes that it is good practice for the target board to ensure that the fee has a clear dollar or percentage cap.

The Panel's primary concern in developing the policy on break fees has been to avoid adverse effects on the market for corporate control in takeovers. Generally, a break fee will be acceptable if it is, in all the circumstances, reasonable and consistent with the Eggleston principles.

A fundamental principle is that the target board should not override shareholder wishes. There is a risk of this where a break fee is payable where the proposal is rejected by shareholders in the absence of a rival proposal or any material change in circumstances. The onus remains squarely on directors of the target to determine whether entering into a break fee arrangement is in the best interests of their shareholders.

It is important to note that the Panel has made no comment on the legality or enforceability of break fees, leaving that for the courts to decide. Therefore, a finding by a Panel that there were no unacceptable circumstances does not mean that the break fee is legal and/or enforceable. However, the Panel will not intentionally facilitate a lock-up device that appears clearly invalid.

No-shop and no-talk agreements

The Panel's policy on no-shop and no-talk agreements is also primarily based on the Panel's role as a market regulator concerned with fair and effective competition for control of companies in the interests of shareholders.

No-shop agreements are designed to ensure that the target does not actively solicit a rival bid, usually for a defined period. No-talk agreements are where the target board agrees not to negotiate with any other bidders, including unsolicited approaches.

An agreement not to seek out or respond to bids may be anti-competitive, and the target board must be convinced of the benefits to shareholders before agreeing to them. The draft policy notes that the anti-competitive effects of such agreements can be minimised by restricting the time period to the minimum necessary in the circumstances. The Panel will be concerned if they continue after the bid has been announced. Such agreements are less likely to be declared unacceptable if directors:

- include provisions which give priority to their duties to target shareholders;

- have assessed the state of competition for the company; and
- sought out the bid having considered other alternatives.

In all the circumstances, whether there is any prospect of a competing bid will be highly relevant in determining whether a particular agreement is acceptable.

Pre-emptive rights

Pre-emptive rights typically give one party preference over a key asset, and may allow a bidder faced with an auction process to exercise at a set price and thus have a bidding advantage over second and subsequent bidders. The ability to block a merger by exercising a pre-emptive right may be a stronger deterrent than a lock-up device (such as a break fee) exercisable only after a second bidder has won control of the target.

In determining whether a pre-emptive right constitutes unacceptable circumstances, the Panel will consider:

- whether the agreement and its terms were disclosed to the market at the time of the agreement and, if not, whether they have since been disclosed in a timely manner;
- whether the terms are fair and commercial; and
- whether target shareholders approved the agreement.

Pre-emption clauses over key assets that are entered into on uncommercial terms are more likely to be considered unacceptable by the Panel, depending on the timing and effect of such clauses.

Conclusion

The Panel's draft policy on lock-up devices provides some clear guidance to the market on what may constitute unacceptable circumstances. The application of the guidelines to specific fact situations brought before a sitting Panel will provide further clarity.

The Panel notes that, although lock-up devices are becoming more common in Australian M&A transactions, the Panel does not consider they should become standard practice in takeovers. The requirement for target board directors to weigh up the advantages of a lock-up device against their duties as directors should ensure that this does not become the case.

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[Recent publications]

"No-Talk," No Good?

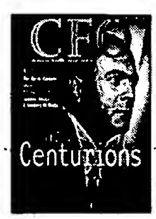
Provisions in merger agreements that prohibit the boards of target companies from talking to other suitors are "pernicious" and a form of "willful blindness."

John P. Mello Jr., CFO Magazine
January 01, 2000

Provisions in merger agreements that prohibit the boards of target companies from talking to other suitors are "pernicious" and a form of "willful blindness." But that's not the spurned company talking. The harsh words are from two judges from the influential Delaware Chancery Court, which is putting pressure on companies to take off the "no-talk" blinders in mergers and acquisitions.

In one case, a judge denied the request for an injunction by Ace Ltd., a Bermuda-based insurance company, based on a no-talk clause in its merger agreement with Capital Re, an insurance holding company in New York. The clause "involves an abdication by the board of its duty to determine what its own fiduciary obligations require at precisely that time in the life of the company when the board's own judgment is most important," the judge wrote. Another judge issued similar sentiments in a merger involving Phelps Dodge Corp., saying its no-talk clause would be "the legal equivalent of willful blindness."

Although the opinions were seen by some as a win for investors, attorneys specializing in mergers and acquisitions were cautious in their appraisal of the probable impact. "They may make it more difficult to lock up deals, but there were some unique facts in the Capital Re case," notes Stephen Radin, a partner with Weil, Gotshal & Manges, in New York. He says two facts the court focused on were Ace's control over the votes of more than 45 percent of its target's (Capital Re) stock and Capital Re's failure to explore the marketplace before it signed



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the merger agreement.

"Whether the court would reach the same conclusion if those facts were not present is difficult to tell," he notes. "However, the court clearly stated a point of view, and that point of view leads to making it difficult to lock up deals."

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An Electronic Marketplace through Agents

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The Scenario

We envision a scenario for a distributed marketplace on the Web. The distribution infrastructure of the marketplace is CORBA plus Web and the marketplace, in addition to resource discovery agents, contains templates of buying and selling agents, pointers to the Document Type Definitions (DTD), trader objects implemented through Trading Object Service and an intelligent dictionary of synonyms.

In this scenario, resource discovery agents working in the background discover resources. If a resource is willing to join the marketplace, the marketplace creates a selling agent workflow template for the resource and registers it with the trader. However if the resource already has a selling agent, that one is registered. When a customer specifies a service or a product s/he wishes to purchase from the marketplace, a buying agent workflow template is created for the customer. The customer may not know the right term to use for the item, that is, the term used in DTD and therefore a dictionary of synonyms is used for this purpose. The buying agent contacts the marketplace and obtains a form for the customer to specify the properties of the item s/he wants to buy which contains the names and types of the attributes of the item. Such a form is necessary since the customer may not know in advance all the properties of the item.

The buying agent gets the form containing the values or ranges for the attributes of the item from the customer along with the criteria that s/he wishes to be optimized in the negotiation phase and the required parameters. The buying agent negotiates with the related selling agents to realize the transaction. A comparative analysis of the available alternatives can also be presented to the customer by the buying agent if the customer wishes so.

An Architecture and the Required Technology

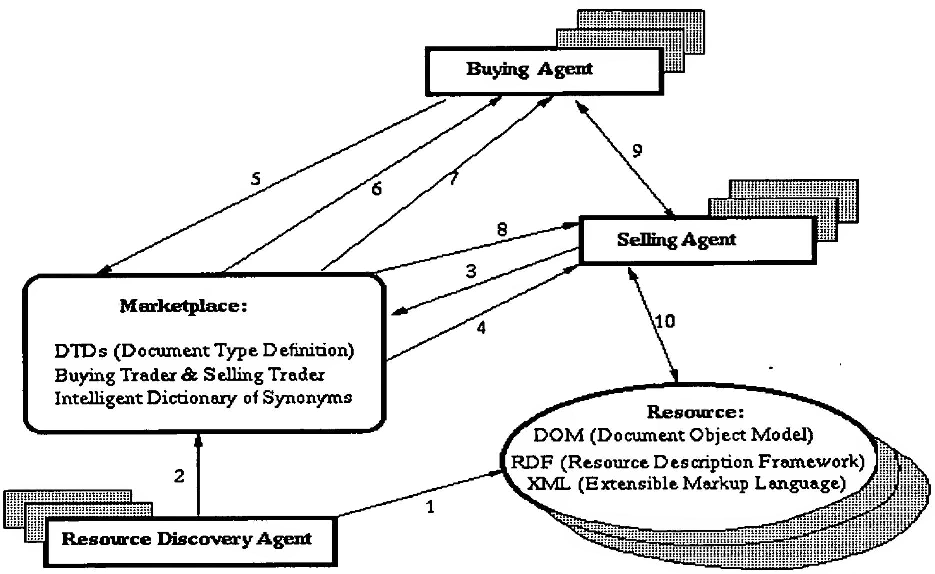
A possible architecture as depicted in Figure 1 and the technology required by such a scenario are as follows:

PHASE I: The resource discovery agents working in the background find out about the resources providing products and services. If the resources want to join the marketplace, the marketplace provides them a template workflow of a selling agent. If the resource already has a selling agent, this one is registered to selling trader through Trading Object Service.

We expect resources to expose their semantics by using the Resource Description Framework (RDF) [LS 97] and the Extensible Markup Language (XML) [W3C a] defined by the World Wide Web Consortium. The RDF is an emerging interoperability standard for metadata to exchange machine-understandable information on the Web. RDF defines both a data model for representing RDF metadata, and an XML-based syntax for expressing and transporting the metadata.

By using RDF, the resource discovery agents do not need intelligence in extracting information from the resources. However they do have other properties of agents like being autonomous, reactive and proactive.

Figure 1: The Architecture of the Marketplace



Phase I: 1. Resource Discovery Agents (RDA) find out about resources using RDF
2. RDA informs of the resource to the marketplace
3. If the resource has already a selling agent, this is registered with the selling trader
4. Else a selling agent is created by the marketplace and is registered with the selling trader

Phase II: 5. Buying agent, created upon a customer request, provides the item name to the marketplace
6. Marketplace provides a form to the buying agent using the related DTD

Phase III: 7. Marketplace provides the OIDs of the matching selling agents
8. Marketplace provides the OIDs of the matching buying agents

Phase IV: 9. Buying agents and selling agents go into direct negotiation through KQML
10. Selling agents access the resources through DOM

The buying and selling agents which are autonomous, reactive and proactive with negotiation ability, should be defined as workflows since they consist of processing steps with data and control flow among them communicating with resources, with the customer and among themselves. A workflow system to be used in modelling a buying or a selling agent should have the following properties:

- The scheduler of these workflows must be truly distributed in the sense that the workflow should be able to execute in any node of the network without consulting to a top level central control. This is essential since the domain of the workflow contains all the Web resources registered to the marketplace. Also since the distribution infrastructure is CORBA plus Web, these resources must have an ORB. It should be noted that it is possible for different ORBs to communicate through IIOP. The other components of the workflow, like the history management used for logging and recovery purposes, should also be handled in a distributed way to exploit the advantages brought by a distributed scheduler.

- The workflow should be defined as a template that can be enriched or reduced (skipping parts of the prespecified workflow skeleton) so that the customer or the resource can adapt it to its capabilities and requirements. Run time modifications to the workflow should also be possible since improvisations may be necessary in the negotiation phase among the agents.

- The buying agents and the selling agents may include other subprocesses, for example the payment process for the buying agent and the shipment process for the selling agents. In other words independently designed workflows (such as payment workflow) may have to be added to the agents' workflow as subprocesses and therefore the workflow specification method must support this kind of composability [MWW 98].

PHASE II: When a customer specifies a service or a product s/he wishes to purchase from the marketplace, a buying agent workflow template is created for the customer. The buying agent is registered to buying trader through Trading Object Service. The buying agent contacts the marketplace and obtains a form which contains the names and types of the attributes of the item. The marketplace uses Document Object Model (DOM) of the World Wide Web Consortium [W3C b] to access the related DTD to obtain names and types of attributes of the product to prepare a form containing this information to be given to the customer.

The resources should provide semantic information about their content to the selling agent. In this respect, the resources should be defined in XML which provides a richer base representation than HTML by making semantic identification of the fields possible through application-specific tags. XML provides support for the representation of data in terms of attribute-value pairs with customer defined tags.

Document Type Definitions (DTD) which are defined for customer groups provide a formal definition of documents for that group, that is, DTDs define what names can be used for elements, where they may occur and how they all fit together in an XML file. In our case all the merchants use the same definition in their DTDs for the item accessed by the selling agent. Therefore there is no need for a translation among terminologies (which is necessary when XML files have different DTDs and different customers define their own ways of using attribute-value pairs to represent the same information). Marketplace contains references to the DTDs and uses the Document Object Model to access and manipulate parsed DTDs as a collection of objects.

The DOM object classes represent generic components of a document, and hence define a document object meta model. DOM represents a document as a hierarchy of objects with proper inheritance relationship among them, called nodes, which are derived (by parsing) from a source representation of a document (HTML or XML).

The major DOM classes are: Node, Document, Element, Attribute, Text, Processing Instruction, and Comment. The representation of a Web page in terms of objects makes it easy to associate code with the various subcomponents of the page. For example, Document object has a "documentType" method which returns DTD for XML documents (and "null" for HTML and XML documents without DTDs) and a "getElementsByTagName" method which produces an enumerator that iterates over all Element nodes within the document whose "tagName" matches the input name provided. Thus DOM provides a general means for applications to access and traverse documents without having themselves to perform complex parsing.

Different names can be provided for the same product by the customers, in other words, the customers may not know the standard terms used in DTDs. Therefore a dictionary of synonyms is necessary in the marketplace. This dictionary of synonyms may be implemented to contain some intelligence in the sense that whenever an item or service is not found in the dictionary, the customer may be asked to provide synonyms and these terms can be added to the dictionary for later use.

PHASE III: DOM is used by the selling agent in processing XML pages to obtain specific product

data, like the price of the product. The selling agent should be authorized to invoke certain applications at the resource to obtain the bargaining strategy and its parameters which implies that the resources should provide this information through a well-defined interface.

The buying agents and the selling agents find out about each other through the related trader objects. Having two trader objects (buying and selling) makes the process symmetric, that is, both buying objects and selling objects can locate all the related agents as soon as they join the marketplace. A buying agent may contact all related selling agents, to determine a buying strategy. For example if a selling agent with a bargaining facility is already giving a lower price than a selling agent without a negotiation facility, the second is eliminated. Such a strategy is also possible for the selling agents. In other words, the buying and selling agents are playing a game where each is trying to satisfy its goal. The buying agents are on the customers' side and the selling agents are on the resources' side.

PHASE IV: The buying agents go in direct negotiation with selling agents provided by the marketplace. In this respect, RDF is used in encoding resources and query capabilities and KQML [LF 97] is used to communicate RDF among agents.

The buying and selling agents in the marketplace act autonomously, that is, once released in the marketplace, they negotiate and make decisions on their own, without requiring customer intervention. They are proactive in contacting the other interested agents and reactive to the changes in the marketplace like new agents.

The negotiation strategies as described in [CM 96] can be used in the negotiation phase. Several parameters can be specified, like the desired date to sell (buy) the item, desired price, lowest (highest) acceptable price and a decay function if the agent wants to lower (increase) the price over its given time frame. However there is a need for more solid bargaining algorithms [BBS 98].

CORBA can be used as the distribution infrastructure. All the agents in the system can be implemented as CORBA objects. Document Object Model defines its interfaces already in IDL which makes it possible to access the resources as CORBA objects too. Furthermore using CORBA as the infrastructure provides the opportunity to use OMG's Trading Object Service as a part of the marketplace. The selling agents of the resources as well as the buying agents can be registered to the related trader objects through the "Register" interface of this service and the buying agents find out about the selling agents through the "Lookup" interface and vice versa. Trading Object Service is distributed in the sense that several traders can be linked through the "Link" interface and can be searched depending on the prespecified policies.

As an extension to this scenario, the buying agent can be activated from an application program through the API of the buying agent. Note that the application might itself be a workflow. In this case the application program should be designed to be able to fill in the form produced by the marketplace.

Feasibility

The technological requirement of the architecture proposed is the semantic interoperability of the Web resources. The building blocks for this, although have already been defined or are being defined mostly as standards, are at their infancy. For example work is underway to define XML- based data exchange formats in both the chemical and health care communities [Manola 98]. A large US project aims to define specific attribute names for specific elements in computer industry that can possibly be implemented through XML DTDs [Danish 98].

The architecture we described requires the DTDs for the user groups to be available. Note that since

RDF assertions use properties defined in the schemas, i.e., DTDs, the use of RDF also depends on the availability of standard DTDs.

Until the standard DTDs become available and the RDFs start using these schemas, there is a need for the following modifications in realizing the proposed scenario:

- The resource discovery agents utilize machine understandable information (RDF) and therefore can not be implemented easily when the standard vocabulary (DTDs) used by RDF is not available. In this case resource discovery agents should either be more intelligent or include heuristic techniques to understand the content of the resources.
- When XML files have different DTDs (i.e., different users define their own ways of using attribute-value pairs to represent the same information), there is a need for a mechanism to identify associations among the terminologies of the XML files. This can be achieved through a translation mechanism between terminologies. This translation is also needed in the negotiation phase among the buying and the selling agents.

Also as stated previously, more solid bargaining algorithms must be developed [BBS 98] to better exploit the scheme described.

Advantages

It is clear that in a marketplace as large as the one provided by the Web, the service provided by the proposed architecture is invaluable. It will not only help to locate better opportunities for both the buyers and the sellers but it will also save a lot of their time in negotiations. In other words, the proposed marketplace aims to find the best conditions for its clients and help to overcome the limitations of direct communications between customers and suppliers.

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